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HARVARD LAW SCHOOL
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REPORTS ^{c†}
OF
Cases in Law and Equity
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XXXVIII.

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DURING THE YEAR 1863.

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- " 3. WILLIAM H. LEONARD.
- " 4. GEORGE G. BARNARD.
- " 5. THOMAS W. CLERKE.

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- " 3. WILLIAM W. SCRUGHAM.
- " 4. JOHN A. LOTT.

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" 2. NOAH DAVIS, JUN.*
" 3. MARTIN GROVER.
" 4. JAMES G. HOYT.

DANIEL S. DICKINSON, *Attorney General*.

* Presiding Justice.

† Sitting in the Court of Appeals.

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CASES

Law and Equity

IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

COWENHOVEN *vs.* THE CITY OF BROOKLYN.

To constitute a cause of action for trespass upon land, it must appear that the plaintiff, at the time of the alleged trespass, had the actual possession of the land, or that, being then disseised, he has since regained the possession by entry, or has obtained a judgment awarding it to him.

The court is not empowered, by section 275 of the code, to grant to the plaintiff any relief to which his proof, on the trial, may seem to entitle him, but only such as is consistent with the case made by the complaint and embraced within the issue.

A plaintiff cannot recover damages for injuries to his possession, when the allegations contained in his complaint negative the existence of such possession in him.

Rejection cannot be sustained against a municipal corporation by proof that at the commencement of the action the *locus in quo* was in use by the public as one of the public streets of a city; such use, being inconsistent with actual occupancy by the corporation, and not affording evidence of any claim by it that it owns or has any interest in the premises.

The grading, paving and cleaning of the street are acts necessary for the fair enjoyment of the public right of way; and may be regarded as showing that the corporation claimed an easement for the public upon the land; but cannot be considered evidence that it claimed any title to, or interest in, the land, itself.

Cowenhoven v. City of Brooklyn.

THE complaint in this action averred that the plaintiff was seised of a parcel of land in Brooklyn, and lawfully entitled to its possession; that the defendant unlawfully, and without his consent, entered it and dug up and removed the soil upon it in 1852, and at various times since then, to his damage in the sum of \$1000; that it was then worth \$1200; that the defendant is unlawfully in possession of it, and unlawfully withholds the possession of it from the plaintiff. It also contained a count for use and occupation. The answer traversed the entry, and the use and occupation specifically, and the other allegations of the complaint generally. The premises were embraced within the lines of Lafayette avenue, as opened and now used as a public highway, which was graded and paved in 1853. At the circuit, after the plaintiff had opened his case, the defendant moved that the plaintiff be ordered to elect whether the complaint should be one of ejectment or one in trespass. The court granted the motion, and to this the plaintiff excepted. The plaintiff then elected that the complaint should be in trespass. After the election of the plaintiff, the court upon an examination of the pleadings held that the complaint set out a cause of action in ejectment, and that the plaintiff was in error in making his election. To this the plaintiff excepted. The plaintiff then introduced evidence to prove his title to the premises, and the occupation thereof as a street, and proved that contracts had been entered into between the defendant and individuals for the paving and grading, and for the cleaning thereof, which had been done, under the direction of the corporation, in pursuance of such contracts. He also proved that the premises could be let for \$50 a year. The plaintiff having rested, the defendant moved to dismiss the complaint on the following grounds: 1st. Because it did not appear that the defendant was in possession of the premises set forth in the complaint, and therefore the action of ejectment could not be sustained. 2d. That he could not in this action recover any other relief. After hearing counsel, the

 Cowenhoven v. City of Brooklyn.

presiding justice ordered the complaint to be dismissed, and it was dismissed accordingly. The plaintiff moved, at a special term, for a new trial, which was denied; whereupon he appealed to the general term.

E. P. Wheeler, for the appellant.

A. McCue, for the respondent.

By the Court, SCRUGHAM, J. On the trial of this action, the defendant moved that the plaintiff should be ordered to elect whether the complaint should (to use the words of the case) "be one of ejectment or one in trespass."

These words, as denoting forms of action, are ignored by the code, but they are used and understood in the profession as indicating the right for an injury to which the remedy is sought by the action, the nature of such injury, and the particular character and extent of the relief which the law authorizes the court to grant, as such remedy. The motion was granted, and the plaintiff excepted. He now claims that if there were two distinct causes of action improperly united in the complaint, the defect was cured by the failure of the defendant to demur. This same point was taken in a case decided in this district, and very similar to this, (*Budd v. Bingham*, 18 Barb. 494;) and it was there held that such an order was proper, notwithstanding the failure of the defendants to demur, because the proof necessary to sustain the two causes of action would be inconsistent and incongruous, and involve a conflict and contradiction not seemly or compatible with the due administration of justice.

The motion to compel the plaintiff to elect was, however, in the present case, unnecessary; for, as will appear, the complaint did not state a cause of action in what was formerly known as the action of "trespass *quare clausum fregit*." And such I understand to have been the subsequent decision of the learned justice before whom the cause was

Cowenhoven v. City of Brooklyn.

tried at the circuit; for after the plaintiff had elected to proceed in trespass, the court, upon an examination of the pleadings, held that the complaint set out a cause of action in ejectment, and the plaintiff excepted. In effect this decision was that no case in the action formerly known as the action of "*trespass quare clausum fregit*" was made by the complaint, and therefore that the plaintiff could not proceed to make out such a cause of action by proof.

There is no averment in the complaint that the plaintiff at the time of any of the alleged trespasses had the actual possession of the land to which the injury is alleged to have been done, or that being then disseised he had since regained the possession by entry, or had the judgment of a competent court awarding it to him. To constitute a cause of action for trespass upon land, some one of these facts must appear; for the gist of the action is the injury to the possession.

Possession in the plaintiff would sufficiently appear from an allegation of title in him; for if the land is vacant and in the actual possession of no one, the title will, in judgment of law, draw after it the possession. In this case the plaintiff deprived himself of this effect of his allegation of title, by averments in his complaint showing that before and at the time he acquired title the land was in the actual possession of the defendant, and has so remained ever since. These allegations of possession in the defendant cannot be rejected as surplusage; for if the complaint is to be regarded as in ejectment, they or some of them are necessary to show a cause of action, and if as in trespass, then by introducing them the plaintiff shows on the face of his own pleading that he has no cause of action. (1 *Chit. Plead.* 231.) Such a pleading is so defective that it was not, under the former practice, cured by the verdict, for the court could only presume those things to have been proven which could be implied from the allegations on the record by fair and reasonable intendment. (*Id.* 673.) And in a case like this, the allegations in the complaint of possession in the defendant

Cowenhoven v. City of Brooklyn.

would preclude the presumption that possession in the plaintiff had been proved.

It is not necessary to inquire how far the code has enlarged the power of the court to amend pleadings on or after the trial, as no application for leave to amend was made, and certainly it is not the duty of the court to suggest amendments which may affect the substantial rights of the adverse party. Nevertheless the plaintiff now claims that the evidence he introduced on the trial established trespass, and that therefore under section 275 of the code such relief should have been granted to him as is consistent with his proof. But the court is not empowered by that section to grant to the plaintiff any relief to which his proof on the trial may seem to entitle him, but only such as is consistent with the case made by the complaint and embraced within the issue. The difficulty in this case did not arise from any mistake or deficiency in the prayer for relief, but from the fact that no such case was made in the complaint as would entitle the plaintiff to recover damages for injuries to his possession of the land, as the allegations contained in it negative the existence of such possession in him.

The evidence offered on the trial was received to sustain the alleged cause of action in what under the former practice was known as the action of ejectment, but the proof would not warrant a recovery in such an action; for it does not establish any actual occupancy by the defendants, or that they were exercising acts of ownership on the premises, or claiming title thereto, or to any interest therein, at the commencement of the action. (3 R. S. 592, § 4, 5th ed.)

In *Child v. Chappell*, (5 Seld. 246,) Judge Denio properly confines the claim of title, or of some interest in the premises spoken of in the statute, to such a claim as that if it were reduced to possession or enjoyment it would constitute an actual occupation of the premises, so as to authorize ejectment to be brought on that ground. The plaintiff sought to sustain this action by showing that at the time of its com-

Scribner v. Kelley.

mencement the *locus in quo* was in use as one of the public streets of the city of Brooklyn. Such use is inconsistent with actual occupancy by the defendant, and does not afford evidence of any claim by it that it owned or had any interest in the premises. The claim of the corporation, if any, was to a public right of way over the land, not incompatible with the title of the plaintiff, for it was a mere easement; nor with his possession, for if he owned the fee of the land over which the street passes, he would in contemplation of law be in possession of the street, and might maintain trespass against another for any use of the land except for the purpose of traveling. (*Cortelyou v. Van Brundt*, 2 John. 357. *Gidney v. Earl*, 12 Wend. 98.) The grading, paving and cleaning of the street were acts necessary for the fair enjoyment of the public right of way; and may be regarded as showing that the defendant claimed an easement for the public upon the land, but cannot be considered evidence that it claimed any title to, or interest in, the land, itself.

The order denying the motion for a new trial should be affirmed.

Order denying new trial affirmed, with costs.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

SCRIBNER vs. KELLEY and others.

The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed.

It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but the propensity of such animals to do dangerous mischief being inherent and well known, the owner or keeper is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an

Scribner v. Kelley.

injury to others through such vicious acts of the animal as he is naturally inclined to commit.

To maintain an action for an injury caused by the vicious act of such an animal, it is not necessary to prove that it occurred through the actual negligence of the owner or keeper; but the negligence upon which his responsibility rests will be presumed.

Where an injury happened to the plaintiff in consequence of his horse taking fright at an elephant passing along the highway in the charge of a keeper, prior to the passage of the act of April 2, 1862, regulating the use of public highways; *Held*, that to render the owners of the animal liable for the damage sustained, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the owners knew or had notice of it.

ACTION brought to recover damages for an injury caused by the fright of the plaintiff's horse at the sight of an elephant of the defendants, about November 22, 1857, at or near Tarrytown, in the county of Westchester. The elephant was in charge of a person alleged to be the servant of the defendants. The person so in charge at the time of the accident was traveling with the elephant on the highway called the Highland turnpike, and was riding on horseback, on the westerly side of said elephant. The plaintiff, with his horse and wagon, was traveling through Beekman street, going east, and was about one hundred feet from said turnpike road, when his horse, seeing the elephant coming down the turnpike, at some distance above the point of intersection of Beekman street with the turnpike, became frightened and ran away, causing the damage complained of. The complaint alleged that the defendants were the owners of said elephant, and the person in charge of him their servant, and that said servant well knew that said elephant was calculated to and would frighten horses, and that by want of care on his part, without any negligence of the plaintiff, the damage occurred. The answer of the defendant Kelley admitted the ownership of the elephant, and denied every other allegation in the complaint. After the plaintiff rested his case, the counsel for the defendants moved for a nonsuit and dismissal of the com-

Scribner v. Kelley.

plaint, on the grounds, 1st. That there was no proof that the defendants knew the elephant would cause and produce such injury; and 2d. There was no proof of carelessness or negligence on the part of the defendants or their agents or servants. Which motion was granted by the court and the complaint dismissed, on the ground that no negligence was shown on the part of the defendants, and the plaintiff excepted to such decision. The plaintiff moved for a new trial, on a case and exceptions ordered to be heard in the first instance at a general term.

Robert S. Hart, for the plaintiff.

Close & Robertson, for the defendants.

By the Court, SCRUGHAM, J. The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed. It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but as the propensity of such animals to do dangerous mischief is well known, and is inherent and not to be eradicated by any effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. Under such circumstances the occurrence of the act producing the injury affords sufficient evidence that the owner or keeper has not exercised the degree of care required of him, and his failure to do so is negligence. Therefore, to maintain an action for an injury caused by the vicious act of such an animal, it is not necessary to prove that it occurred through the actual

negligence of the owner or keeper, but the negligence upon which his responsibility rests will be presumed.

This is so because the injury results from a vicious propensity which is the natural effect and sure accompaniment of the savage and ferocious nature of the animal, and the existence of such qualities in him is equivalent to proof of express notice of the propensity. But it is apparent that the rule will not apply where the injury does not proceed from any such propensity; for it is only of its existence that the savage and ferocious nature of the animal can be regarded as notice.

In this case the injury resulted not from the act of the elephant, but from the fact that his appearance, as he was passing along the highway, caused the horse of the plaintiff to become frightened and unruly. To render the defendants liable for the damage that accrued, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the defendants knew or had notice of it; for if it is conceded that the elephant is of a savage and ferocious nature, it does not necessarily follow that his appearance inspires horses with terror. It does not appear that the elephant was at large, but on the contrary that he was in the care, and apparently under the control, of a man who was riding beside him on a horse; and the occurrence happened before the passage of the act of April 2d, 1862, regulating the use of public highways. There is nothing in the evidence to show that the plaintiff's horse was terrified because the object he saw was an elephant, but only that he was frightened because he suddenly saw, moving upon a highway crossing that upon which he was traveling, and fully 100 feet from him, a large animate object to which he was unaccustomed—*non constat* that any other moving object of equal size and differing in appearance from such as he was accustomed to see might not have inspired him with similar terror. The injury which resulted from his fright is more fairly attributable to a lack of ordinary courage and

Dinenny v. Fay.

discipline in himself, than to the fact that the object which he saw was an elephant.

The complaint was properly dismissed, at the circuit.

Judgment for the defendants, with costs.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

DINENNY vs. FAY, late Sheriff, &c.

Taking the body of a debtor in execution is the highest form of satisfaction of a judgment. Hence the neglect of a sheriff to arrest the debtor, upon an execution issued against his person, is a wrong to the property, rights or interests of the judgment creditor, which would survive to his executors or administrators, and is therefore assignable.

Although the courts have always made a distinction, and held that the cause of action does not survive against the executor or administrator of the wrongdoer, unless his estate was benefited by the wrong, yet it seems from the reading of the *statute* that the cause of action for the same class of actions, precisely, survives alike in favor of the executors and administrators of the injured party, and against the executors and administrators of the wrongdoer.

But whether the distinction is well founded, or not, it is well settled that the wrongdoer is liable himself, to the executor or administrator of the person injured, in an action for a neglect of duty, whether the wrongdoer was benefited by the wrong, or otherwise.

In an action on the case, against a sheriff, for neglecting to take the body of a defendant in execution, the sheriff should be allowed, by way of mitigating damages, to prove the pecuniary circumstances and condition of the defendant in the execution.

THIS was an action against the defendant, as late sheriff of Steuben county, for neglecting to arrest one Henry B. Tufts on an execution issued by a justice of the peace against his person, in an action brought against him by Alonzo Curtis, for wrongfully injuring personal property. The judgment had been assigned to the plaintiff in this suit by Curtis, with his right of action against the sheriff. The present action was tried at the Steuben circuit, in April, 1861, before Jus-

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tice KNOX and a jury. The defendant moved for a nonsuit, on the following grounds: 1. That the plaintiff had failed to show any opportunity to arrest Tufts, or that he was in the county of Steuben, or had been in it. 2. That the right of action was not assignable. 3. That the execution contained no direction as to when or where it should be returned. The motion was denied by the court. The defendant then offered to prove that Tufts was a worthless person; and that nothing could have been gained by the arrest. The plaintiff objected to the evidence, on the ground that it would be no defense, and that the answer to that count in the complaint did not set up such defense. The court sustained the objection, and excluded the evidence. The judge, among other things, charged the jury that it mattered not whether Tufts was worth any thing; that is, whether he had any property which the sheriff could get hold of. The jury found a verdict in favor of the plaintiff for \$79.16. The exceptions taken at the trial were ordered to be heard in the first instance at the general term.

F. C. Dinunny, for the plaintiff.

H. Sherwood, for the defendant.

By the Court, JOHNSON, J. This action was brought against the defendant as sheriff, for the neglect of his deputy in not serving a body execution in his hands against one Henry B. Tufts. There was a judgment against Tufts, in favor of one Alonzo Curtis, on which an execution against the defendant's property had been issued and returned, no property found. Execution was then issued against his body, and placed in the hands of the deputy on the 20th of August, 1857. Tufts continued to reside in the county until the 20th of September, 1857, when he left the state, and has not since returned. The evidence tended to show that the deputy, while he had this execution in his hands, knew where

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Tuffts resided, and that he called upon him two or three times with the execution, without arresting him, and that he was requested to arrest Tuffts by the plaintiff in the execution, in September, before he, Tuffts, left the state, and was informed by the plaintiff where he was.

The plaintiff is the assignee of the judgment, and of this cause of action against the defendant. It is claimed by the defendant's counsel that the cause of action is not assignable, as it was at the trial, when a nonsuit was asked upon that ground, which was refused. Whether the cause of action is assignable depends, as it would seem, mainly upon the question whether it would survive to the executors or administrators of the assignor in case of his death. (*Zabriskie v. Smith*, 3 Kern. 322. *McKee v. Judd*, 2 id. 622. *The People v. Tioga Com. Pleas*, 19 Wend. 73.)

If it was a wrong done to the property, rights, or interests of the assignor, the right of action would survive to the executor or administrator. (3 R. S. 5th ed. 746, § 1.) This clearly does not fall within any of the exceptions mentioned in the several sections of the act.

It seems to me that upon the authority of numerous adjudged cases, this must be held to be an injury done to the estate of the assignor. It has been held that an executor could maintain case for a false return to final process. (*Williams' Ex. v. Cary*, 4 Mod. 403. S. C., 12 id. 71.) This was upon the ground that it was an injury to the estate. In that case the under sheriff had actually levied more than he had returned. And so for an escape on final process. It seems to have been sometimes doubted whether the executor could have an action against the sheriff for an escape upon mesne process. But upon principle, as Mr. Chitty says, he may. (See 1 Chit. Pl. 79, 80, and cases there cited.) The principle upon which the action is maintained for the escape is, that the body is a pledge for the debt, and by the loss of the pledge the estate is injured. In *Paine v. Ulmer*, (7 Mass. Rep. 317,) it was held that an action against a

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sheriff for the default of his deputy in not returning an execution, survived to the administrator of the judgment creditor. There the action was for not returning the execution, merely. The point was taken by the defendant's counsel that no action had ever been maintained by an executor or administrator for a mere nonfeasance; and it was urged that it was not alleged in the declaration that either the body of the defendant in the execution, or his property, could have been taken. But the court, without hesitation, held that the action could be maintained, and ordered judgment.

This is a much stronger case, as it appears by the evidence that the body of the defendant in the execution might have been taken. It is apparent, therefore, that the judgment creditor was deprived of the satisfaction of his judgment by the neglect of the defendant's deputy. The law presumes damage in such a case, and the statute gives an action against the sheriff to recover it. (3 B. S. 5th ed. 739, § 98.) The damage was of course to the estate of the creditor, and *prima facie* was the full amount of the judgment. (*Pardoe v. Robertson*, 6 Hill, 550.) Taking the body of the debtor in execution is the highest form of satisfaction of a judgment. It is clear, I think, that this was a wrong to the property, rights, or interests, of the judgment creditor, which would have survived to his executors or administrators, and was, therefore, assignable.

It is claimed by the defendant's counsel that a cause of action does not survive to the executor or administrator of the party injured, except in cases where it will survive against the executor or administrator of the person who was guilty of the wrong; and that an action of this kind could not be maintained against the defendant's executors or administrators. It would seem, from the reading of the statute, that the cause of action for the same class of wrongs, precisely, survives alike in favor of the executors and administrators of the injured party, and against the executors and administrators of the wrongdoer. Such is the plain reading of the stat-

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ute, and I can have no doubt that such was the intention. But the courts have always made a distinction, and held that the cause of action does not survive against the executor or administrator of the wrongdoer, unless his estate was benefited by the wrong. (*The People v. Gibbs*, 9 Wend. 29. *Franklin v. Low*, 1 John. 396. *Cravath v. Plympton, adm.*, 13 Mass. Rep. 454.)

The statute makes no such distinction. The action is there plainly given against the executors or administrators of the wrongdoer, "for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer." The action is for the wrong done to the property or interests of another, and not for the benefits accruing to the property or interests of the wrongdoer. I can see no good reason for any such distinction, in law or morals, and it is difficult to understand how it ever could have obtained under our statute. If the executors or administrators of the wrongdoer were chargeable personally, there would seem to be a good reason for holding that they should not be made liable unless some funds had come to their hands by means of the wrong of their testator or intestate. But as no such consequence attaches against them, I do not see why the plain letter and reading of the statute should be thus perverted. This distinction was taken at an early day in England, under a statute wholly different in terms from ours, and when the courts were determining what cases, not falling within the letter of the statute, came within the equity and intention of it. The distinction thus taken has been followed by our courts, I think, without observing the difference between our statute as it now stands, and our former statute, and the English statute under which it was first taken.

But whether this distinction is well founded or not, it does not help the defendant. For it is equally well settled that the wrongdoer is liable himself, to the executor or adminis-

trator of the person injured, in a case of this kind, whether he was benefited by the wrong or otherwise.

The remaining question is, whether the defendant should have been allowed, by way of mitigating damages, to prove the pecuniary circumstances and condition of the defendant in the execution. The offer was to prove that such defendant was, at the time the judgment was rendered against him, and at all times afterwards, utterly insolvent, and without any means whatever to satisfy the debt, so that nothing could have been gained by his arrest. This offer was overruled, and exception duly taken. It has been repeatedly held, in actions against a sheriff for not returning, or not collecting, an execution against property, that the evidence thus rejected was proper in mitigation of damages. (*Ledyard v. Jones*, 3 *Selden*, 550. *Humphrey v. Hathorn*, 24 *Barb.* 278. *Bank of Rome v. Curtiss*, 1 *Hill*, 275. *Pardee v. Robertson*, 6 *id.* 550.) The same evidence has also been held admissible, in actions for an escape, on mesne process. (*Patterson v. Westervelt*, 17 *Wend.* 543. *Potter v. Lansing*, 1 *John.* 215. *Kellogg v. Manro*, 9 *id.* 300. *Burrill v. Lithgow*, 2 *Mass. Rep.* 526. *Brooks v. Hoyt*, 6 *Pick.* 468.) I see no good reason why the rule should not be the same in actions on the case, for neglecting to take the body of the defendant in execution.

It is urged on behalf of the plaintiff, that the body of a defendant in execution, being in law the highest form of satisfaction of a judgment, is equally so, whether the defendant is rich or poor; and that it is nothing to the sheriff what kind of satisfaction a plaintiff may elect to take of his judgment. But the conclusive answer to this is, that an action of this kind is given against the sheriff by statute, "at the suit of any party aggrieved, for the damages sustained by him." This means pecuniary damages. Hence, if it should be made to appear that satisfaction in that form alone could be of no pecuniary advantage to the plaintiff, by reason of the poverty of the defendant, that fact would seem to be

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competent on the question of damages. The question is, what pecuniary loss has the plaintiff sustained by reason of the negligent or wrongful act. In actions for an escape on final process, brought against a sheriff, it has been held in England, and also in Massachusetts, that evidence of the insolvency of the defendant, in mitigation of damages, was admissible. (*Arden v. Goodacre*, 11 Com. Bench Rep. 371; 73 Eng. Com. Law Rep. 371. *Chase v. Keyes*, 2 Gray, 214.) But in both England and Massachusetts the statutes give such an action to recover the damages sustained, and not the amount of the judgment. In this respect those statutes are precisely like our statute which gives this action. In actions for an escape from imprisonment on execution, in this state, the statute gives as damages, "the debt, damages, or sum of money, for which such prisoner was committed, to be recovered by action of debt." (2 R. S. 437, § 63.) And hence it has always properly been held in such actions, in this state, that evidence of the insolvency of the defendant was improper. (*Rawson v. Dole*, 2 John. 454. *McCreery v. Willett*, 23 How. Pr. R. 129. *Renick v. Orser*, 4 Bosw. 384.) This proceeds upon the sole ground that the statute gives as damages the entire debt or sum for which the prisoner is committed. And this rule, obviously, must still prevail here, in such an action, although the action of debt *in form* has been abolished by the code, in all cases where the whole debt is claimed in the complaint, as was held in *McCreery v. Willett*, and *Renick v. Orser*, (*supra*.) But that does not affect the rule in this action, which is given by a different statute. In *Rawson v. Dole*, (*supra*.) which was an action of debt for an escape of a debtor in custody on a *ca. sa.*, Spencer, J., who delivered the opinion of the court, says: "If an action on the case had been brought, it might have been inquired what was lost by the escape, and the jury might have given such damages as they supposed the party had sustained."

This being in nature strictly an action on the case, to

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recover the damages which the plaintiff had sustained, it was proper to inquire into the pecuniary circumstances, and condition of the defendant in the execution, for the purpose of enabling the jury to determine what pecuniary loss the plaintiff had sustained by the *nonfeasance*. Upon the whole evidence, it would be for them to determine whether the plaintiff had lost the whole of his debt, or what part, if any, had been thus lost. *Prima facie*, undoubtedly, the whole has been lost, if nothing is shown on the part of the defendant. But when the defendant's circumstances are inquired into, the jury will determine whether the arrest would have produced a satisfaction in money.

The evidence offered was improperly excluded, and there must consequently be a new trial, with costs to abide the event.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Welles and J. C. Smith, Justices.*]

DELOSS ROSE vs. PHILANDER F. BELL and SYLVIA BELL,
his wife.

A married woman, living with her husband, and having no separate estate, cannot, in the absence of her husband, and without his knowledge or consent, enter into an agreement in writing, for the purchase of real estate on credit.

Such an agreement is a mere nullity; conferring no rights, and imposing no obligations upon either party.

Hence, the possession of the premises is, in law, the possession of the husband, and in no respect that of the wife. She is therefore improperly joined with her husband in an action by the vendor, to recover the possession of the premises for a default in the payment of the purchase money.

Where a complaint, in ejectment, alleged that a defendant was in possession claiming in right of his wife, whereas it appeared by the evidence that he was in possession claiming in his own right; *Held* that this was a variance in no respect material in regard to the merits of the action, so far as the husband was concerned; and that it was a case in which the court might

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have directed the fact to be found according to the evidence, and ordered an amendment of the complaint, without costs, under section 170 of the code.

ACTION to recover the possession of real estate. On the 30th of March, 1852, the defendants executed and delivered to the plaintiff a mortgage on the premises in question, to secure the payment of \$442.02. This mortgage was foreclosed, without serving any notice on the wife, and the premises were sold to the plaintiff in May, 1858, when he became the owner. On the 6th of September, 1858, while the defendant Philander F. Bell was still in possession and claiming to own the premises, the plaintiff made a written agreement with Sylvia Bell, the wife, without the knowledge or consent of her husband, by which he agreed to sell and convey the premises to her, on certain terms and conditions, and she agreed to purchase and pay for the same, and to keep the property insured, and pay all taxes. She was, at the time, a married woman, having no separate estate. Default having been made in the payment of the purchase money, this action was brought against Bell and his wife to recover the possession. Sylvia Bell, the wife, insisted, in her answer, that she was not a necessary or proper party to the action, and should not have been joined as such. The cause was tried at the Steuben circuit, in April, 1861, before Justice KNOX and a jury. The jury were directed to find a verdict against both defendants; and they found accordingly.

Geo. B. Bradley, for the plaintiff.

Clark Bell, for the defendant P. F. Bell.

D. Rumsey, for the defendant Sylvia Bell.

By the Court, JOHNSON, J. It is impossible for the plaintiff to maintain this action against the defendant Sylvia Bell, upon the undisputed facts of the case. She is the wife of

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the other defendant, and lives with her husband, upon the premises in question, and has not, and never had, any separate estate. The contract, between her and the plaintiff, which was read in evidence, and by which she agreed to purchase the premises in question, and the plaintiff agreed to sell, and to convey to her, upon the payments being all made, is a mere nullity. It conferred no rights, and imposed no obligations upon either party. It was an attempt to deal with a married woman upon credit, in real estate, in the absence of her husband, and without his knowledge or consent, as is expressly shown by the evidence. The contract does not purport upon its face to have been made on behalf of the husband, by the wife, but entirely in her own separate right, as well as name. Indeed it is expressly alleged in the complaint that the defendants both entered into possession claiming in right of the wife.

All the disabilities of coverture, on the part of a married woman, are still in force, except such as have been removed by the legislature. The legislature have not yet gone quite to the extent of authorizing a married woman, especially if she has no separate estate, to purchase land upon credit. Indeed it is quite apparent that they never contemplated giving a married woman the power to speculate in real estate, upon her own credit, whether she had a separate estate or not. Even if the act of 1860 (*Sess. Laws of 1860, ch. 90*) could, as I think it cannot, be construed to confer such authority, this pretended contract was previous to that act, and can derive no aid from it.

It is unnecessary to cite authorities to show that, at common law, such a contract by a *feme covert* was entirely nugatory. The possession was, therefore, in law, the possession of the husband, and in no respect that of the wife. This being so, she was improperly joined in the action, and was, of course, entitled to a nonsuit, or to a verdict in her favor.

The question then arises, whether the action can be maintained against the husband, or must fail altogether. In ac-

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tions of this kind where there are several defendants, if the verdict be for the plaintiff it shall be against such of the defendants as were in possession of the premises, or as claimed title thereto at the commencement of the action. (2 R. S. 307, § 30.) It appears from the evidence that Philander F. Bell, the husband, was in possession, at the commencement of the action, claiming in his own right.

A nonsuit was claimed on behalf of the husband upon the ground that the complaint alleged that he was in possession claiming in right of his wife, whereas it appeared by the evidence that he was in possession claiming in his own right. This presents a question of mere variance between the pleadings and the evidence. The plaintiff makes out a clear title to the premises, derived from the defendants, and there can be no doubt that the husband was in possession wrongfully at the commencement of the action. This variance is in no respect material in regard to the merits of the action, as far as the husband is concerned, and there is no pretense that he was, or could have been, misled to his prejudice. It was a case, therefore, in which the court might have directed the fact to be found according to the evidence, and ordered an immediate amendment of the complaint, without costs, under § 170 of the code. As a joint verdict however was ordered, which was excepted to, there must, for aught I can see, be a new trial, which is ordered; costs to abide the event.

[MONROE GENERAL TERM, September 1, 1862. Johnson, Welles and J. C. Smith, Justices.]

COLTON *vs.* BEARDSLEY, BIGELOW and SPOONER.

Proof that an individual is reputed to be, and and has acted, notoriously, as a public officer, is *prima facie* evidence of his official character, without producing his appointment.

This exception to the general rule requiring the best evidence to be given, is founded upon the strong presumption that arises from the exercise of a public office, that the appointment to it is valid; and is made for the reason that it would be attended with general inconvenience to require full and strict proof of the appointment or election of public officers.

In an action against a person for an act which he had no right to do unless an officer, he must show that he was *prima facie* an officer *de jure*. Proof of acting as such under color of authority, and of reputation, is admissible evidence for that purpose; and if proved, is sufficient, in a collateral proceeding, to establish that character. POTTER, J. dissented.

The uniform practice of the courts has been to admit proof that officers have been reputed to be and have acted as such, in cases where they have been sued for their official acts and have sought to justify their acts as incumbents of the office. *Per ROSECRANS, J.*

Proof of a call by the trustees of a school district, for a special meeting of the inhabitants, for the purpose of filling vacancies in the office of trustee, of the assembling of the inhabitants under that call, the election of two persons as trustees to fill vacancies, and of their acceptance by entering upon the duties of the office, is proof of an election by the competent authority, and constitutes the persons thus elected, *prima facie*, trustees *de jure*.

To defeat such *prima facie* title to the office, a party attacking it cannot be allowed to give evidence showing that no vacancy in the office of trustee existed when the persons were chosen.

The authority to call a special meeting to fill a vacancy in the office of trustee being vested in the remaining trustees, and the power to fill it, in the meeting when assembled under such call, the act of the trustees in calling the meeting, and of the meeting in filling the vacancy, are quasi judicial acts; inasmuch as both the trustees and the meeting must first have exercised their judgment and discretion, and determined and adjudged that a vacancy existed.

Hence, whether there was, or was not, a vacancy in fact, and if there was, whether it had existed for over one month before the election; and if it had, whether it arose from a cause which authorized it to be filled by the supervisor of the town, is wholly immaterial, in an action against the persons elected, for an act done by them as trustees; because they are not questions which can be traversed in such action.

Matters of that nature can only be traversed in a direct proceeding to set aside or quash the election. Until the election be so set aside or quashed

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by such a proceeding, the persons claiming to be elected are protected for all acts done by virtue of the office held under color of such election.

When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose.

The test of jurisdiction, in such cases, is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong.

Where an individual is present at a special meeting of the inhabitants of a school district, called for the purpose of filling vacancies in the office of trustee, remains silent when the office is being filled as vacant, makes no objection when it is filled, and without objection sees the persons elected enter upon the duties and assume responsibilities in said office, he himself neglecting to act as trustee, he will be held *estopped* from denying the title of the persons so elected to the office, on the ground that, he himself being a trustee, at the time, there was no vacancy to be filled.

A general non-performance of the duties of an office is a refusal to serve. A refusal to serve may be as clearly and strongly inferred from the acts of an incumbent as from a direct assertion that he will not discharge the duties of the office.

Thus where a trustee of a school district had not done any business, as such, for some time previous to a special meeting called for the purpose of filling a vacancy in the office, and he attended such meeting and witnessed the election of another as his successor, without making any objection; *Held* that a virtual refusal to serve was clearly shown.

The insertion of an improper item in a tax warrant issued by the trustees of a school district will not vitiate the warrant, if otherwise valid, or render the trustees liable in trespass. The warrant is void for the excess, only, and the trustees personally liable in an action to recover back any part of such excess paid or collected. But an action to recover the value of the property sold on the warrant cannot be sustained.

Where a warrant issued for the collection of a second assessment was the same paper that had been used to collect a former assessment, with the exception that the first assessment had been detached from the warrant, the date of the warrant altered, and the second assessment attached to it; and the warrant thus altered was, with the second assessment, delivered to the collector; *Held* that there was nothing in this proceeding that operated to vitiate the warrant; it being, for all practical purposes, and in legal effect, a new warrant.

When a school district has no site for a school house, the trustees are authorized by the statute to fix one; but when a school house shall have been built or purchased, the site shall not be changed, without the supervisor's consent. In such case two things are requisite, to effect a change; the consent of the supervisor, and the vote of the district; and it matters not which has the precedence.

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The certificate of the supervisor is only necessary to effect a change of site; it does not relate to the levying of a tax.

A school district, having a site on which there had been a building used for school purposes, and such building having been torn down, the inhabitants on the 12th of May, 1857, met and voted to change the site of the school house, and they also, by a separate resolution, voted to raise \$200 to build a new school house. The assessment of the \$200 tax bore date June 8, and the warrant, June 10, 1857, but the levy and sale were not made until 1858, under a renewed warrant. The consent of the supervisor, to a change of site, was obtained June 22, 1857. *Held* that whether the resolution to change the site was legal, or subsequently became so, was immaterial; that the district being without a school house, and owning a site on which a new house could be built, it had the right to raise the money; and that the resolution not designating where the new house should be built, and not being coupled with any other resolution or matter, the court could not say that the money was voted for an illegal purpose. And that in the absence of any express words, it could not infer that the tax was voted to be expended on the new site, when there was a legal site on which it might be expended.

THIS was an action to recover for the taking and conversion of certain property. The defendants justified their acts as trustees of school district No. 17, in the town of Dekalb, St. Lawrence county.

To prove his case, the plaintiff gave in evidence two warrants issued by the defendants as such trustees; one dated April 8, 1857, the other dated June 10, 1857; and proved that under the first the collectors seized and sold a heifer, worth \$24, and under the second, two cows and a heifer, worth \$76. On cross-examination the defendants asked the plaintiff's first witness if, at the several dates of the two warrants, they were not acting trustees of district No. 17. The question was objected to, on the ground that the defendants could not show themselves trustees by reputation, or by proving their own acts. The court sustained the objection, and the defendants excepted.

When the plaintiff rested, the defendants moved for a nonsuit, on the ground that the warrants on their face showed that the defendants were the trustees of said district, and that their proceedings, including the sale of the plaintiff's

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property, were regular. The court denied the motion, and the defendants excepted.

The defendants then showed by the records of the district that the defendant Spooner was elected trustee for three years at the annual meeting held September 27, 1856; that Spooner and one Stammer were trustees in February, 1857, and that as such trustees they called a meeting of the inhabitants of said district for the 19th of February, 1857, to fill vacancies in the office of trustees, and to do such other business as might seem necessary; that notice was given of such meeting; that such meeting was held, at which time the defendants Beardsley and Bigelow were elected trustees, the former in place of Colton, and the latter in place of Stammer; and that Colton was present at such meeting. That meeting also voted to raise a tax of \$10 to repair school house. The defendants further showed that another special meeting of said district was notified and held on the 12th. of May, 1857, at which time it was voted to change the site of the school house of said district, and that it was further voted to raise by tax \$200, for the purpose of building a school house in said district. The defendants produced the consent of the supervisor to change the site of said school house, dated June 22, 1857. The assessment which the first warrant was issued to collect was made March 14, 1857. The warrant was to collect \$26.59, viz : the \$10 voted at special meeting February 19, \$10 levied by the trustees in addition to repairs of school house, \$1.50 for book case, 46 cents for broom, 75 cents for wood, \$2.25 for building fires, 13 cents for fixing stove, \$1 for repairing school house in 1856, and 50 cents for banking school house. The tax ordered to be made on this warrant was not collected, and the same was renewed May 18, 1857, by the defendants Beardsley and Bigelow, and the property sought to be recovered was sold on such renewed warrant. The assessment for the second warrant was made June 8, 1857, for \$200, and the warrant was issued for its collection. The defendants used for this

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purpose the same warrant issued to collect the first assessment, after detaching it from the first assessment, altering its date, and attaching it to the new assessment, and delivered it to the collector for collection. This warrant was partially collected. It was renewed October 5, 1857, and again renewed by consent of the supervisor January 28, 1858. Under the second renewal the plaintiff's property was taken and sold.

The defendants proved, under objections, the ruling upon which was reserved by the court, that the defendants acted as trustees of said district after the 19th of February, 1857, up to the time of this trial, hiring teachers and doing the other business of the district, and that neither the plaintiff nor any persons other than the defendants have acted as such since that date. The defendants offered to show that at the annual meeting of said district, held September 25, 1857, Beardsley and Bigelow were duly elected trustees. This evidence was objected to and excluded, and the defendants excepted.

The plaintiff offered to show that at the annual meeting of the district in September, 1854, he was duly elected a trustee for three years, and had ever since and still resided within the district. This evidence was objected to, the objection overruled, the defendants excepted and the evidence given. The proof showed that on the site owned by the district was formerly an old shanty, which had been used for the purpose of a school house, but had been torn down before the \$200 was voted. It was objected on the trial, by the plaintiff, and the questions at the time reserved by the court, 1st. That the first warrant was for a greater amount than had been authorized by the meeting; 2d. That its renewal was after it had expired; 3d. That the second warrant was the same one used in the first case, and was *functus officio*; 4th. That the meeting of May had no right to vote the tax for which the second warrant issued, as the supervisor had not then authorized a change of site. The evi-

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dence being closed, the defendants again moved for a nonsuit, on the ground that they had shown a complete justification, &c. The court refused to nonsuit the plaintiff, and held as matter of law and instructed the jury; 1st. That the consent of the supervisor was a jurisdictional fact, and should have been obtained prior to the meeting of May 12, 1857, and that the vote at that meeting to change the site and raise \$200 tax to build a house, and the warrant issued for the collection of it, were therefore void, and the defendants were trespassers for collecting the warrant; 2d. That it was not sufficient for the defendants in this action to prove that they were trustees *de facto* merely, but they must prove they were trustees *de jure*, and for that reason neither of the warrants issued by them afforded protection to them. To all of which the defendants excepted. The jury found a verdict for the plaintiff for \$100.84.

Dart & Tappan, for the plaintiff.

Morris & Vary, for the defendants.

JAMES, P. J. The acts of mere usurpers of office, without any color of title, are undoubtedly wholly void, both as to individuals and the public; but where there is color of lawful title, the doings of such officers, as it respects third persons and the public, must be respected until they are ousted by an appropriate proceeding to try the validity of the title to the office. It has been repeatedly adjudged that the acts of an officer *de facto*, though his title may be bad, are valid, so far as they concern the public and the rights of third persons who have an interest in the things done. (*Green v. Burke*, 23 Wend. 490. *The People v. Stevens*, 5 Hill, 630. *The People v. Hopson*, 1 Den. 574. *Plymouth v. Painter*, 17 Conn. Rep. 585.) But in an action against a person for acts which he would have authority to do only as an officer, he must, in order to make out a justification, show that he is

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prima facie an officer *de jure*. (*Green v. Burke and The People v. Hopson, supra. Fowler v. Beebe, 9 Mass. Rep. 231.*)

The question presented is, was there not proof, or an offer of proof, *prima facie* sufficient to show that the defendants were such trustees? The defendants offered to prove that when they issued the warrants they were acting trustees of this district, which was excluded, and it was subsequently proved that the defendants did act as trustees of said district, were the only persons who discharged that duty, and that they were reputed to be such officers.

It is a general rule that the best evidence should be produced of which any case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact. Its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party, to prevent fraud. This rule, however, was adopted for practical purposes, and should be so applied as to promote the ends of justice. It is therefore subject to exceptions, where the *general convenience* requires it; and naturally leads to the division of evidence into primary and secondary classes. Among the exceptions to the foregoing general rule, proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character, without producing his appointment. (*Greenl. Ev. § 83. Berryman v. Wise, 4 Term Rep. 366. Wilcox v. Smith, 5 Wend. 231-4. U. S. v. Reyburn, 6 Peters, 352, 367. Rex v. Gordon, 2 Leach, 581, 585, 586. Rex v. Shelley, Id. 581, n. 7 Peters, 100. Bryan v. Walton, 14 Geo. Rep. 185. Allen v. State, 21 id. 217.*) On this subject *Greenleaf*, in his work on *Evidence*, (vol. 1, §§ 91, 92,) says: "The rule rejecting secondary evidence is subject to some exceptions, grounded upon the public convenience, or the nature of the facts proved. Thus the contents of any record of a judicial court, and of entries in any other public books or registers, may be

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proved by an examined copy, and is admitted because of the inconvenience to the public which the removal of such documents might occasion, and also of the public character of the facts they contain. For the same reasons, and from the strong presumption arising from the undisturbed exercise of a public office, that the appointment to it is valid, it is not, in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary appears, (*Wilcox v. Smith*, and *Plymouth v. Painter*, *supra*;) and it is not material how the question arises, whether in a civil or criminal case, nor whether the officer is, or is not, a party to the record, (*Rex v. Gordon*, and *Berryman v. Wise*, *supra*; *McGahey v. Alston*, 2 *Mees. & Wels.* 206, 211; 3 *Term Rep.* 632; 6 *id.* 663; 5 *B. & A.* 243; 2 *Campb.* 131; 3 *id.* 432;) unless, being plaintiff, he *unnecessarily avers* his title to the office, or the mode of his appointment, in which case the proof must support the entire allegation."

Phillips, in his *Treatise on Evidence*, (vol. 1, p. 432,) says: "It is not in general necessary to prove the written appointments of public officers; for this would be attended with general inconvenience, and a strong presumption arises from the exercise of a public office that the appointment to it is valid. The cases upon this subject sometimes appear to be governed by the doctrine of admissions, but it will be seen by the example that the exception is of a more extensive nature. In the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in these characters, without producing their appointments." *Potter v. Luther* (3 *John.* 431) was an action of trespass *de bonis asportatis*; the defendant pleaded that he was a deputy sheriff, and took the property by virtue of a *fi. fa.* against the plaintiff, and offered to prove by reputation that he was general deputy of the sheriff. The evidence was overruled, and the plaintiff had judgment. On certiorari to the supreme

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court the judgment was reversed, the court holding the proof admissible and sufficient. The case of *McCoy v. Curtice* (9 *Wend.* 17) goes to the whole extent of the principle here contended for. The action was trover: the defendant justified the taking as a collector of a school district, under a warrant against the plaintiff. On the trial he produced the warrant, proved by parol that the persons signing it were reputed to be and acted as trustees of said district, and also proved by parol, under objection, that he acted as collector of said district, and as such took the property. The defendant had a verdict, and the plaintiff sued out a writ of error. The court in disposing of the case say: "It is a general rule in relation to all public officers that *they* may *establish* their *official character*, by proving that they are generally reputed to be, and have acted as such officers, without producing their commission or other evidence of their appointments;" citing the various authorities to which allusion has hereinbefore been made.

Thus it will be seen that in all these cases the principle is distinctly recognized and acted upon, that in an action against a person for an act which he had no right to do unless an officer, he must show that he was *prima facie* an officer *de jure*, and that proof of acting as such under color of authority and of reputation is admissible evidence for that purpose, and if proved, is sufficient, in a collateral proceeding like this, to establish that character.

It therefore follows that a new trial should be granted for the refusal to receive such evidence when offered, or if not rejected when given, for disregarding it in the determination of the case.

But supposing I am mistaken in this view, did not the defendants prove themselves trustees *de jure* by other proof given on the trial? As to Spooner the proof was clear. The question arises as to Beardsley and Bigelow. All the acts complained of took place between February, 1857, and March,

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1858, previous to which the two latter named defendants claim to have been elected trustees.

The statute provides that each school district shall have three trustees, unless the inhabitants otherwise determine, whose term shall be for three years. Trustees have the power to call special meetings in their respective districts; the inhabitants of a district when convened at a special meeting have power to choose trustees as often as the office becomes vacant; in case a vacancy shall happen in such office by death, refusal to serve, removal out of the district, or incapacity, and the vacancy shall not be supplied by a district meeting within one month thereafter, the supervisor is authorized to appoint; and every person duly chosen or appointed trustee, who without sufficient cause shall refuse to serve therein shall forfeit the sum of \$5, and every person so chosen or appointed and not having refused to accept, who shall neglect to perform the duties of his office, shall forfeit the sum of \$10. This is the substance of the statutes. There rests in the trustees the power to call special meetings, and in such meetings the power to fill vacancies and impose a penalty against any person elected who shall refuse or neglect to serve.

The defendants showed a call for a special meeting of the inhabitants of said district for the purpose of filling the vacancies in the office of trustees, and the assembling of the inhabitants under that call, the election of the defendants Beardsley and Bigelow as trustees to fill vacancies, and their acceptance by entering upon the duties of the office. This was proof of an election by the competent authority, and constituted them *prima facie* trustees *de jure*. The plaintiff sought to defeat this *prima facie* title to office by attacking the regularity and legality of the election. He was permitted, under objection and exception, to give evidence in order to show that no vacancy in the office of trustee existed when the defendants were chosen. The admission of that evidence was error. The authority to call a special meeting

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to fill a vacancy in the office of trustee being vested in the remaining trustees, and the powers to fill it, in the meeting when assembled under such call, the act of the trustees in calling it, and of the meeting in filling it, were quasi judicial acts, because both trustees and the meeting must first have determined and adjudged that a vacancy existed.

Therefore, whether or not there was a vacancy in fact, and if there was, whether it had existed for over one month before the election; and if it had, whether it arose from a cause which authorized it to be filled by the supervisors of the town, is wholly immaterial; because they are not questions which can be traversed in this action. Such matters can only be traversed in a direct proceeding to set aside or quash the election; and until such election be so set aside or quashed by such proceeding, the defendants are protected for all acts done by virtue of the office held under color of such election.

This is like the case of *Wood v. Peake*, (8 John. 69.) The defendant being sued for trespass, justified his acts as constable, under an appointment from three justices, to fill a vacancy. The plaintiff proved there was no vacancy; that the person whose office the defendant was appointed to fill had never refused to serve, was able to serve, and did serve. The evidence was objected to, but admitted, and the plaintiff had judgment on review. The court said, "the statute declares that if any constable chosen &c. shall refuse to serve, it shall be lawful for the inhabitants of the town to supply such vacancy at a special town meeting to be notified and held, &c., and that if the town shall not within fifteen days next after such refusal &c. choose another, it shall be lawful for any three justices of the peace, residing in or near such town, and they are required, by warrant under their hands and seals, to appoint any such officer which the town ought to have chosen, and every officer so appointed shall hold his office for so long time, and have the same powers, and be liable to the same penalties, as if elected. And if any person so appointed a constable, &c. shall refuse to serve,

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he shall forfeit a penalty of \$62.50. This appointment is a judicial act ; for the justice must first determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it up. It is not traversable in such a collateral action. The appointment remains valid until it be set aside or quashed in the regular course, upon certiorari. It is certainly sufficient to justify the constable. He comes to the office by appointment, regular according to the forms of law, and by a tribunal having jurisdiction in the case, and he is bound to accept, under a penalty. He is not to inquire, at his peril, into the validity of the act. It is sufficient that three justices have authority to make such an appointment in a given case. It would be intolerably oppressive to place the constable in the dilemma of subjecting himself to a grievous penalty if he refuses, or of being prosecuted for trespass if he accept." The testimony to impeach the appointment was held inadmissible, and the judgment reversed. See this case approved in *Green v. Burke*, (23 Wend. 502.)

In this case the defendants showed their election by authority competent to elect to such an office in a given case, and that election remains valid until quashed or set aside by due process of law ; and the incumbents are protected for acts done in virtue of the office.

Again ; were it necessary, the plaintiff should be held estopped from denying the defendants' title to the office. He was present at their election, remained silent when the office was being filled, as vacant, made no objection when it was filled, and without objection saw the defendants enter upon the duties and assume responsibilities in said office, himself neglecting to act in his now claimed official character.

Again ; suppose the plaintiff not estopped, and that the defendants' title to the office could be tried in this action, how stands the case upon the proof ? Spooner's title was not denied ; no proof was given or offered, to show that Bigelow was not elected to an actual vacancy, and therefore the whole question would turn upon Beardsley's title. The

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proof offered, to show that no vacancy existed for Beardsley to fill, was that the term for which the plaintiff had been elected, in 1854, had not expired ; and that he was then, and ever since his said election had been, a resident of the district. This did not show that no vacancy existed. It may all have been true, and probably was, and yet the office at the time vacant by reason of the plaintiff's refusal to serve, resignation or incapacity ; and after the other evidence, the legal presumption, in the absence of affirmative proof, was that a vacancy did exist. The court on the trial held the reverse. It held that proof of an election two years before, for three years, was *prima facie* evidence that the office was still held by such persons, notwithstanding it had been declared vacant by competent authority, another elected to fill it, and in possession. But the defendants did not rest upon the presumption of law ; they proved that the plaintiff had not done any business as trustee for some time before the special meeting at which Beardsley was elected, and that he was present at that meeting. This showed a refusal to serve. A refusal to serve is a general non-performance of the duties of the office. (*Spafford v. Hood*, 6 *Cowen*, 478.) It would never do to say that no act should operate to create a vacancy in an office, short of an absolute or declared refusal. A refusal to serve may be as clearly and strongly inferred from the acts of an incumbent, as a direct assertion that he will not discharge the duties of the office. (*The People v. Carrique*, 2 *Hill*, 93, 97.) A virtual refusal to serve was clearly shown in this case. The inhabitants of the district so understood and acted upon it, and the plaintiff's presence at the filling the vacancy, and subsequent conduct, approved their understanding and ratified their acts. Such being the case, Beardsley was, so far as the same can be inquired into in this action, legally elected, and was a trustee *de jure*.

The warrant dated April 8, 1857, was to collect \$26.59. Of this sum \$10 was voted at the special meeting, February, 1857, for the repairs of the school house, \$10 was levied by

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the trustees, they being authorized to levy that sum in each year for repairs, in addition to the sum voted by the district, and the remaining sum was for book case, broom, wood, making fires, and repairs. For none of the latter items, except the wood, were the trustees authorized to issue their warrant, without a vote of the district. But the insertion of this sum in the warrant does not vitiate it, or render the trustees liable in trespass. (*Seaman v. Benson*, 4 Barb. 444. *Easton v. Calendar*, 11 Wend. 90.) The warrant was void for the excess only, and the defendants personally liable in an action to recover back any part of such excess paid or collected. But an action to recover the value of the property sold on the warrant, cannot be sustained.

It is insisted that the second warrant was void because it was the same one used to collect the first assessment. The proof showed it to be the same paper, with the exception that the first assessment had been detached from it, its date altered, the second assessment attached to it, and the warrant thus altered, with the second assessment, delivered to the collector. I can discover nothing in such proceeding that operates in the least to vitiate the warrant; it was, for all practical purposes, and in legal effect, a new warrant; as much so as if its contents had been copied by the trustees on to a new piece of paper and signed by them.

The next objection is that the tax of \$200 voted to build a school house, and the warrant to collect the same, were void, because the vote of the district to change the site of the school house was without the written consent of the supervisor. The statute declares that "whenever a school house shall have been built or purchased for a district, the site of such school house shall not be changed, nor the building thereon be removed, so long as the district shall remain unaltered, unless by the consent in writing of the supervisor of the town within which such district shall be situate," &c. (*Laws of 1847*, ch. 480, § 73. *Laws of 1856*, ch. 179, § 26.) This consent the plaintiff insists is essential to confer jurisdiction

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upon the district to act upon the question of change. No doubt such consent must be obtained before a change can be effected ; but that the consent must first be obtained before the district can vote for a change of site, I deny. Such is not the language of the statute. When the district has no site, the trustees are authorized to fix one, but when a school house shall have been built or purchased, the site shall not be changed without the supervisor's consent. In such case two things are requisite to effect a change ; the consent of the supervisor and the vote of the district ; and it makes no difference which has the precedence.

This certificate of the supervisor is only necessary to effect a change of site ; it does not relate to levying a tax. The powers of the district to vote a tax for any sum less than \$400, for building a school house, is expressly conferred by statute ; and such a tax may be levied and collected before the inhabitants have designated a site for the building. (*Benjamin v. Hull*, 17 *Wend.* 439.) In this case the proof showed that the district had a site on which had been a shanty used for school purposes. That the shanty had been torn down ; that on the 12th day of May, 1857, the inhabitants got together and voted to change the site of the school house, and that they also, by separate resolution, voted to raise \$200, to build a new school house.

At this time the supervisor had not consented to a change of site, but his certificate was subsequently obtained, June 22, 1857, and this, together with the vote of the district, effected the change. The assessment of the \$200 tax bears date June 8, and the warrant June 10, 1857, but the levy and sale was not until 1858, under a renewed warrant. (11 *Wend.* 91. 1 *Denio*, 221. 4 *Barb.* 447.)

Whether the resolution to change the site was legal, or subsequently became legal, is a matter of no moment, in the view which I take of this case, even though the district may have voted the tax with the expectation that the new house would be built upon the new site. At the time of the vote

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the district was without any school house; it owned a site on which a new house could be built; it had the right to vote to raise the money; the resolution did not designate where the new house should be built, but simply authorized the raising of money to build a new house, and was not coupled with any other resolution or matter. Therefore the court cannot say that the money was voted for an illegal purpose. In the absence of express words it cannot infer that the tax was voted to be expended on the new site, when there was a legal site on which it might be expended. The case differs, in this particular, from that of *Benjamin v. Hull*, (17 Wend. 437.) There the resolution required the new house to be built on the site to be procured by the trustees, which right of selection the district had no power to delegate. It also differs from *Baker v. Freeman*, (9 Wend. 36.) There the district had consented to change the site without consent, and none was ever procured; they voted a tax of \$32 to pay for the new site, which was clearly unauthorized; at a subsequent meeting they voted a tax to build a school house, and the two taxes were included in the one warrant: the court held both taxes void. The court did not pass upon the question whether a subsequent consent would legalize a change of site and the tax; nor did it appear that the district at the time was the owner of another site. It conceded the powers of the district to vote the tax as declared on its face, but it went back of the resolution and assumed the tax was voted for the purpose of building a school house, not upon the old site, but upon the one directed to be purchased, and that that might have affected and probably did affect the vote in that case, and that the district had no power to raise money to build a school house on that site.

The assumption of the court from the facts stated in the case may have been warranted, but whether that was so or not, or whether the legal conclusions based upon that assumption are sound or not, the proof in this case would not justify this court in the assumption that this tax was voted expressly

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to build upon the new site. Whatever suspicions of that kind may prevail they cannot be made the basis of judicial action, unless sustained by proof.

A new trial should be granted; costs to abide the event.

ROSEKRANS, J. The defendants are sued for the taking and converting of the plaintiff's property, which was levied on by a collector of a school district in the town of Dekalb, St. Lawrence county, and sold by him by virtue of a warrant issued to him by the defendants as trustees of said school district. The defendants seek to justify the act as such trustees. It is settled by a long line of authorities, in our own state and in other states, that the acts of officers *de facto* are valid, so far as the public and third persons are concerned, and that neither their title to the office nor the validity of their official acts can be indirectly called in question in proceedings to which they are not parties. To this extent the official acts of an officer *de facto* are as valid and effectual as though he were an officer *de jure*. This rule is established for the benefit of the public at large, and those who have an interest in such official acts, but it gives no immunities to the officer *de facto* himself; nor does it confer upon him any rights, or shield him from any responsibility. When prosecuted for an act done by him as such officer which he would justify under the office, or when he attempts to enforce any legal right which appertains solely to the office, he is bound to show that he is an officer *de jure*. It is useless to add to the citations made by Mr. Justice POTTER to sustain this position.

But in order to show that the defendant is an officer *de jure*, it is not necessary in the first instance that he should do more than to give evidence that he is reputed to be and has acted as such officer. The rule requiring the best evidence to be given has this exception, which is founded upon the strong presumption that arises from the exercise of a public office, that the appointment to it is valid. The excep-

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tion is made for the reason that it would be attended with general inconvenience to require full and strict proof of the appointment or election of public officers. (1 *Phil. Ev. ch. 9, Edw. ed.*, p. 592. 1 *Greenl. Ev.* §§ 83, 92, and notes.) This rule was adopted in this court in the case of *Potter v. Luther*, (3 *John.* 431.) The plaintiff brought an action of trespass *de bonis asportatis* before a justice of the peace. The defendant pleaded that as one of the deputies of the sheriff of Washington county he took the goods by virtue of a *fi. fa.*, and offered to prove by reputation that he was a general deputy of the sheriff. The justice overruled the evidence, and required that the defendant should produce the appointment by the sheriff. The case was brought into this court, which said: "It is a general rule to admit proof by reputation that a person acts as a general public officer or deputy. In *Berryman v. Wise* (4 *T. R.* 366) the court of king's bench in England decided that in case of all peace officers, justices of the peace, constables, &c. it was sufficient to prove that they acted in those characters, without producing their appointments, and that, even in a case of murder." In *McCoy v. Curtice* (9 *Wend.* 17) the action was trover for a watch. The defendant pleaded the general issue, and justified as collector for a school district. He produced a warrant signed by the trustees, and proved by parol that the persons who signed the warrant were reputed to be and acted as trustees, and also proved that he (the defendant) had acted as collector of the district. This parol evidence was objected to when offered, and the objection was overruled. The jury found a verdict for the defendant; and on error brought to this court, Sutherland, J., delivering the opinion of the court, said: "It is a general rule in relation to all public officers, that they may establish their official character by proving that they are generally reputed to be and have acted as such officers, without producing their commission or other evidence of their appointment. This is well established as to all peace officers, sheriffs, constables, justices of the

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peace," &c.; and he cites 4 *John.* 366; *Potter v. Luther*, 3 *id.* 431; 6 *Binn.* 88; 9 *Mass. Rep.* 231; 7 *John.* 549; 9 *id.* 125; 12 *id.* 296; *Wilcox v. Smith*, 5 *Wend.* 231.

It is true that many of these cases merely established the doctrine that the evidence is competent to prove the official character of officers under whose process the party offering the evidence is seeking to justify his own acts; but the court held, distinctly, that the parol evidence of the official character of the collector himself was competent. The same doctrine was held in *Sawyer v. Steele*, (3 *Wash. C. C. R.* 464.) In *Doe ex dem. Bowley et al. v. Barnes*, (8 *Q. B.* 1037, 56 *E. C. L. R.*,) the plaintiffs brought ejectment as church wardens and overseers of the poor of the parish of Nether Broughton, and gave parol evidence that they were the officers they claimed to be. The defendant objected that their appointment ought to be proved, and that it was not sufficient for the purpose of the action to show that they were acting as church wardens or overseers, at the time of the demise. The plaintiffs had a verdict, with leave to the defendant to move for a nonsuit, and on argument of the motion, the court held, Patterson, J., as follows: "It is a recognized principle that a person acting in the capacity of a public officer is *prima facie* taken to be so. The fact of itself does not prove any title, but only that the person fills the office." The rule for leave to move for a nonsuit was discharged. In *Butler v. Ford*, (1 *Cr. & M.* 662; *S. C., Tyr.* 677,) Lord Lyndhurst, C. B., said: "As to the question whether the defendants had proved themselves to be constables and watchmen under a local act, I think it was sufficient to prove that they acted in those characters. Evidence of this nature is evidence that they were duly appointed. It is not conclusive, but quite sufficient as a *prima facie* case." And Bailey, J. expressed the same opinion. In *McGahey v. Alston*, (2 *Mees. & Wels.* 206,) the plaintiff sued as vestry clerk, and the defendant pleaded that he was not vestry clerk. The point was expressly taken that the plaintiff's right to sue depended on

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his being vestry clerk, and that unless he was legally placed in that office he must fail in that action. But the objection was overruled, and Parker, baron, said: "The plaintiff is a public parochial officer, and the rule is that all public officers who are proved to have acted as such are presumed to have been duly appointed, until the contrary is shown." The uniform practice of the court in like cases has been to admit proof that officers have been reputed to be and have acted as such, in cases where they have been sued for their official acts, and have sought to justify their acts as incumbents of the offices. Indeed, I have never known a case where other evidence of official appointment or election has been required. For these reasons I think that the judge at the circuit erred in excluding parol evidence that the defendants, at the time they signed the warrants, were acting as trustees of school district No. 17, De Kalb, and that the exception to such ruling was well taken. The defendants subsequently gave in evidence the proceedings of the district meeting on the 19th February, 1857, showing that at that meeting the defendant Beardsley was appointed trustee in the place of the plaintiff, and that the defendant Bigelow was appointed trustee in the place of Warden Stammer. They also proved by parol that the defendant Spooner had acted as trustee of the district since the annual meeting of the district in 1856; that all of the defendants had acted as trustees of the district since February 19, 1857; and that neither the plaintiff nor any other person had acted as such since that time. This last evidence was objected to by the plaintiff as incompetent and immaterial, and it was insisted that the defendants must show themselves officers *de jure*. The judge reserved the objection and received the evidence, subject to it. At a subsequent stage of the cause the judge was requested to nonsuit the plaintiff, on the ground that the defendants had made out a complete justification; that it appeared they were acting as trustees *de facto*, if not *de jure*; that there did not appear to be any irregularity in their proceedings; and that

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the defendants were authorized to issue the warrants under which the plaintiff's property was sold. This motion was denied; and the judge held that it was not sufficient for the defendants to prove that they were trustees *de facto* merely, but that they must prove they were trustees *de jure*; that for that reason neither of the warrants issued by them afforded them a protection, and that the only question necessary for the jury to consider under his ruling was the value of the plaintiff's property sold under the warrants. These rulings were severally excepted to by the defendants, and the judge was requested to charge the jury that if they were satisfied from the evidence that the defendants were trustees *de facto*, their acts were binding on the plaintiff. This request was refused, and the refusal was excepted to.

I am clearly of the opinion that the learned judge erred in denying the motion to nonsuit the plaintiff, upon the ground on which it was claimed: 1st. That the defendants had made out a complete justification; and 2d. That it appeared that the defendants were authorized to issue the warrants under which the plaintiff's property was sold. And I think also that the other ground, to wit, "that it appeared that the defendants were acting as trustees *de facto*, if not *de jure*," was improperly overruled. The decision in effect excluded or disregarded the evidence that the defendants acted as trustees of the district after February 19, 1857, and denied to the defendants the legitimate force of that evidence. Within the principles laid down in the authorities cited, this evidence was *prima facie* evidence of the fact that the defendants were trustees *de jure* of the district when they issued the warrant under which the plaintiff's property was taken; and this *prima facie* case was not overcome by any evidence given on the part of the plaintiff. It was not directly proved that Colton was ever a trustee. It must be inferred from the evidence, that at some time prior to February 19, 1857, he had been elected a trustee. The minutes of the meeting of that date state that the defendant Beardsley was appointed

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trustee in the place of Colton, and one witness testified that "Colton's time had not expired." This last expression could only mean that the time for which he was elected, if he had been elected, had not expired. But the same witness added that the plaintiff did not act or do any business as trustee for some time before that meeting, and there is no evidence in the case that he ever did act as trustee. Besides, the notice of the meeting of February 19, 1857, was to fill a vacancy in the office of trustee, and the minutes showed that the vacancy was in the office to which Colton was elected. To rebut the *prima facie* case made out by the defendants, that they were trustees *de jure*, by proof that they acted as such trustees, it was necessary that the plaintiff should have proved his election and acceptance of the office, either by the record or by his acts. The onus was cast upon him by the *prima facie* case made by the defendants to overcome this evidence by counter proof. He did not show his acceptance of the office, if he was ever elected; or that he did not refuse to accept the office; or that he did not refuse to serve; or if he accepted the office, that he had not resigned it; or that he had not become incapacitated to serve as trustee. A vacancy in his office could have occurred by either of these circumstances, and a vacancy can occur by the removal of a trustee from office for willful neglect of duty. (1 R. S. 5th ed. 897, § 114. *Id.* 889, § 71.) No presumption could be indulged that the trustees, or the district, had acted illegally in their proceedings to fill a vacancy in the plaintiff's office. The plaintiff was bound to show that he was trustee *de jure*, in order to overcome the case made by the defendants. The evidence showed that Beardsley was trustee *de jure*, and the plaintiff was not. These considerations would seem to be sufficient to reverse the judgment and to require a new trial. It may be that on another trial the plaintiff will be able to prove his election as trustee, his acceptance of the office, and that he had not resigned the office or become incapable of acting as trustee; that he continued to reside in the district,

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and that he had not been removed from his office. And it may be for the interest of the parties that we should consider the case in the light of such evidence. I have no doubt that if such evidence shall be given, the plaintiff cannot recover in this action. The statute has made it the duty of the trustees of school districts, and conferred upon them the power, to call special meetings of the inhabitants of the district liable to pay taxes, *whenever they shall deem it necessary and proper*. (1 R. S. 5th ed. 898, § 119, sub. 1.) A clerk of the district is required to give notice of special meetings when the same shall be called by the trustees. (*Id.* § 118, sub. 2.) A special meeting is required to be held in each district whenever called by the trustees, (*Id.* 895;) and the inhabitants, when lawfully assembled at any district meeting, have power to choose a trustee as often as the office of trustee is vacant. (*Id.* 894, § 99, sub. 3.) Under these provisions of the statute, the question whether there is a vacancy in the office of any trustee must be determined *in limine* by the other trustees. It is a question calling for the exercise of their judgment and discretion, and their action upon it partakes of the character of a judicial act. And it is of the essence and nature of such acts, whether the power to perform them is committed to a court or a body of men or to an individual, that they are final and conclusive, except in a direct proceeding for their reversal; and that they cannot be inquired into or questioned collaterally. When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. (*Brittain v. Kennard*, 1 Brod. & Bing. 432; *S. C.*, 4 Moore, 50. 12 Pick. 572, 582, 583. *Ex parte Watkins*, 3 Peters, 202, 209. *Supervisors of Onondaga Co. v. Briggs*, 2 Denio, 33, 34. 11 Wend. 95. *Phil. Ev. ch. 1*, § 5, note 293. 2 *id.*, *Edw. ed.*, 15 and fol. *Weaver v. Devendorf*, 3 Denio, 117, 120, and authorities cited. *Broom's Leg. Max.* 56 to 66. *Henderson v. Brown*,

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1 *Caines*, 90, *Kent and Livingston, Js.*) The test of jurisdiction in such cases is, whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong. (1 *Q. B. Rep.* 66. *Reg. v. Bolton*, 41 *Eng. C. L. Rep.* 439. *Cave v. Mountain*, 1 *Man. & Gr.* 257; 39 *Eng. C. L. Rep.* 432.)

An act of congress passed February 28, 1795, (1 *Stat. at Large*, 424,) "provided that whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." Under this act the president made his requisition upon the state of New York for a portion of her militia. One Mott was summoned to service under this requisition and failed to comply, and was tried by a court martial and fined, and his property was seized to satisfy the fine. He brought replevin in this court, and the defendant justified under the requisition of the president and the proceedings under it. The supreme court gave judgment against the defendant, and the court for the correction of errors affirmed it. The case was removed to the supreme court of the United States, and that court held unanimously (*Martin v. Mott*, 12 *Wheat.* 19, 31) that the authority to decide whether the exigency had arisen belonged exclusively to the president, and that his decision was conclusive upon all other persons; that whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. The case of *Vanderheyden v. Young* (11 *John.* 150) arose under the same act of congress, and was similar in its features to those of *Martin v. Mott*, (*supra.*) And in that case Spencer, J.

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says: "It is a general and sound principle that whenever the law vests any person with the power to do an act and constitutes him a judge of the evidence on which the act may be done, and at the *same time contemplates* that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quo ad hoc*, a judge. His mandates to his legal agents on his declaring the event to have happened, will be a protection to those agents; and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination." In *Jenkins v. Waldron* (11 John. 114) it was held that officers required by law to exercise their judgment are not answerable for mistakes in law, or mere errors in judgment, without fraud or malice. The case of *Wood v. Peake* (8 *id.* 69) is somewhat analogous to the one under consideration, and contains a principle which I think establishes a sure defense in this action. The sixth section of chapter 78, laws of 1801, provided that "if any constable chosen &c. *shall refuse to serve, it shall be lawful for the inhabitants of the town to supply such vacancy* at a special meeting to be notified and held, &c., and that if the town shall not within 15 days next after such refusal choose another, it shall be lawful for any three justices of the peace residing in or near such towns, and they are required, by warrant under their hands and seals, to appoint every such officer which the town ought to have," &c. Peake sued Wood in the Montgomery common pleas in trespass for taking his property, and Wood justified under an execution issued by a justice of the peace and an appointment of himself as constable under this act, by three justices, which stated that Jonathan Lawrence, one of the constables of the town, had for more than 15 days past refused to serve in his office, and the town not having appointed one in the room or stead of Lawrence, that therefore the three justices appointed (the defendant) Wood a constable. The plaintiff proved the election of Lawrence as a constable, and offered to prove that

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Lawrence never did refuse to serve as constable, nor was he unable to serve, but that he actually did serve as constable three days after the date of Wood's appointment, and three months afterward. This evidence was objected to, but was admitted, and upon it the plaintiff had judgment, which on error to this court was reversed. The cause was argued in the supreme court by two of the most distinguished counsel in the state—the late lamented Daniel Cady, afterwards one of the justices of this court, and Abraham Van Vechten. It was insisted for the plaintiff in error that the appointment by the three justices was a judicial act, and being in a case in which they had jurisdiction, it was conclusive; that the act of the justices could only be corrected by a direct proceeding for that purpose; and that the common pleas had no right to decide upon the validity of the appointment. For the defendant in error it was insisted that the power given to the justices was special, and must be strictly pursued; that it could only be exercised in case an officer chosen should refuse to serve, and that it appeared in the case that Lawrence had not refused to serve; that the justices therefore had no authority or jurisdiction, and the appointment was void. The court made use of this language: "This appointment was a judicial act, for the justices must *first* determine and adjudge that there is a vacancy in the office, and that the town neglected to fill it. It is not traversable in such a collateral action. The appointment remains valid until it be set aside or quashed in the regular course, upon *certiorari*. It is certainly sufficient to justify the constable. He comes to the office by an appointment, regular according to the forms of law, and made by a tribunal having jurisdiction in the case; and he is bound to accept under a penalty. He is not to inquire at his peril into the validity of the act. It is sufficient that these justices have authority to make such an appointment in the given case." *Although the defendant in that case was a ministerial officer, and the court say, "the appointment was clearly sufficient to justify the constable,"*

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yet the case is not decided upon the character of the officer, but upon that of the act by which he held his office. The court say the appointment was a *judicial act*. This term is used by way of accommodation. Perhaps it would have been as well to have said that the making of the appointment was in the nature of a judicial act, as it called for the exercise of judgment and discretion.

The power was not exercised by the justices in their capacity of judges or as a court. (*Rice v. Parkman, Parker, J.*, 16 *Mass. R.* 330.) It might have been delegated to a clerk of the court, had the legislature seen fit, and within fifteen days after the vacancy in the constable's office. It was delegated to the inhabitants of the town. The power did not call for any decision between parties to an action; nor did it require the entry of any judgment upon the facts; but as it required the exercise of judgment and discretion and the determination and decision of a question of fact, the nature of the power was quasi judicial, and when exercised the decision was final, and conclusive until reversed in a direct proceeding for that purpose, and could not be questioned collaterally. (*Van Wormer v. Mayor of Albany*, 15 *Wend.* 262.) The effect is the same, upon whomsoever such a power is conferred, whether it be the president of the United States, justices of the peace, the inhabitants of a town or school district, or the trustees of a school district. The case of *Wood v. Peake* (*supra*) is cited with approval in *Green v. Burke*, (23 *Wend.* 502, 3,) by Cowen, J. He says, "though the place (constable's office) being full was a jurisdictional objection, yet the question was one on which the justices had power to pass judicially. There are many such cases." Applying this principle to the case before us, it is clear that the determination of the trustees that there was a vacancy in the office, and their act in calling a special meeting of the inhabitants of the district to fill the vacancy, and the act of the special meeting in filling it, were final and conclusive, and not to be questioned collaterally. I lay out of the case, entirely, the fact that the

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plaintiff was present at the special meeting and then said by his silence that his office was vacant. It is unnecessary to inquire whether his acts do not amount to an estoppel to his alleging that his office was not then vacant; although my impression is that it should have that effect. The case of *Cummings v. Clark*, (15 *Verm. Rep.* 653,) cited by Mr. Justice POTTER, is not analogous to this case, and if it were, I think the doctrine of the other cases to which I have referred, which hold the determination of the trustees conclusive that the office of their co-trustee was vacant, is to be preferred. In that case the defendant justified in trespass under a warrant to collect a highway tax. He had been appointed to fill an office for the reason that the incumbent had refused to act, and Redfield, J. said: "The refusal to act is not *ipso facto* vacating an office. There is nobody to exercise a judicial discretion on that subject, to declare the office vacant. The statute under which the defendants in the case acted, (1 *R. S.* 897, § 114, 5th ed.,) declares that a vacancy in the office of trustee may be occasioned by the death of a trustee, *his refusal to serve*, his removal out of the district, &c. Perhaps the legislature intended that the *refusal to serve* should mean a *refusal to accept the office*; but how a vacancy can be filled in any case by the district or town superintendent, or how the remaining trustees can call a special meeting of the inhabitants of the district to fill a vacancy, without first determining whether a vacancy has occurred, is beyond my comprehension. The case of *Wood v. Peake* (*supra*) was cited in *Van Orsdall v. Hazard*, (3 *Hill*, 249,) by Cowen, J. He says of it, "that it looks strongly in the direction of holding that the appointment by the justices was a judicial act, and if correct in principle the appointment is conclusive." He adds: "I confess the exercise of the power to appoint in a given case has always appeared to me rather an act of ministerial or executive than judicial power." This may be conceded to be correct, that the appointment to office is a ministerial or executive act;

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but it must be remembered that the determination that there is a vacancy in the office necessarily precedes the act of appointment, and that decision involves the exercise of judgment and discretion. The decision is final and cannot be inquired into collaterally; and all action founded upon it must necessarily be of the same nature.

The other questions arising in the case have been considered by my brethren, and I concur in their views in relation to them. For the reasons stated, I think the judgment should be reversed and a new trial granted, with costs to abide the event.

POTTER, J. (dissenting.) The defendants in this action are sued directly for their wrongful official act, by which they took the property of the plaintiff, and disposed of it without authority of law; and the question is whether they, (not acting as ministerial officers,) and sued *directly as parties* to the action, for the tortious act, make a sufficient defense by showing themselves to be acting as officers *de facto*. The judge at the circuit held that this was not sufficient, and held also, that in such case the defendants must show themselves to be officers *de jure*. If the judge at the circuit was wrong in so holding, the judgment should be reversed, for every other decision excepted to is merged or swallowed up in this. This question should be first directly decided. It should not be evaded. There is another question which, on the argument, was urged by counsel, and is now treated, here, as if it was *this* same question, but it is not; and deciding such different question, does not decide this. Some nine cases have been cited to prove that a *ministerial officer, de facto, such as a sheriff, bailiff, constable, tax collector or school district collector, acting under process issuing either from a court of general jurisdiction, or from a body of limited jurisdiction, if the subject matter is within that jurisdiction, is protected, if the officers who issued such process are officers de facto*. These cases can be multi-

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plied. I have found in my researches not less than *fifty* cases equally strong and conclusive, to the same point with those cited. But as that is not the question to be decided, enough have been cited to prove that undoubted and well settled proposition.

It also seems to be further necessary, in presenting the real question to be decided in this case, to disembarass it of certain other matters that have been discussed which do not belong to the case, in order that the *real* question, and that only, may be decided.

1. It is conceded that trustees of school districts have certain *judicial* duties to perform, and it is, I think, clearly the law that in the performance of such duties they are not responsible for any error of judgment, misjudgment of law, or mistake in fact, while acting within their jurisdiction and the scope of their powers; and that such acts cannot be reviewed collaterally. So far, then, as relates to any errors or mistakes committed within the jurisdiction of such officers, this question need not be further discussed.

2. It is equally well settled that the acts of judicial as well as ministerial officers acting as such officers *de facto*, by color of title, are as valid, *so far as the public or the rights of third persons are concerned, as though they were officers de jure*. And when they are not parties to the proceeding, their title cannot be inquired into collaterally, nor can the title of a *ministerial or executive officer* be inquired into collaterally, even though he be a party to the action, if the process be fair on its face; and the officer who issued it had jurisdiction of the matter. Nor is *this* the question to be decided here.

It is a remarkable feature of the cases cited, as well as of the multitude not cited, that each and every one of them have qualified the rule laid down, by the use of the same language of qualification, to wit, that the acts of such *de facto* officers are valid, "*so far as the public or the rights of third persons are concerned.*" What is the significance

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and meaning of this *universal* qualification? Surely it has not been so long continued as mere ornament or surplusage. It must mean something. Who is there except the public, and third persons, that *can be* concerned? In what cases would not the acts of *de facto* officers be valid? It is at least fair to assume, that the most learned and distinguished jurists of the country for a period of two hundred years would not have continued *this useless qualification* if the rule was *universal*. I will then assume that the rule is *not* universal, and look for the exception and the reason of it. Now let us examine the cases cited, to prove that the ruling at the circuit was error, and see if they establish it. (*McCoy v. Curtice* (9 *Wend.* 17) was an action against a school district collector, (a ministerial officer,) for taking the plaintiff's watch for a school tax. The defendant proved that he acted as collector, proved his warrant signed by two trustees, and proved the organization of the district, &c. by parol. The court permitted the defendant to prove that the trustees were reputed to be such, deciding what we have above conceded to be the law. That is all of that case. In *The People v. Cook*, (14 *Barb.* 287,) Mason, J. was discussing the objection that had been raised, that the election in a certain district was void, for the reason that one of the officers who held the election omitted to take the oath prescribed by statute. He held, most properly, that the officer was one *de facto*, and that *as far as the public and third persons were concerned*, his acts were valid. The case of *The People v. Yates* (4 *John.* 366) is also cited, but I do not find any principle there laid down having any application to this case. In the case of *Potter v. Luther*, (3 *id.* 431,) the defendant was sued in trespass *de bonis asportatis*; he pleaded that he was deputy sheriff, and that he took the goods by virtue of a *fiery facias*; and offered to prove by reputation that he was a deputy. He was a *ministerial* officer. The court correctly decided that such proof was proper. (*The People v. Collins*, 7 *id.* 549.) This was a motion for a

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mandamus against the defendant, town clerk, to compel him to record the survey of a road laid out by the commissioners. The clerk, in his answer, put his refusal on the ground that the commissioners had not sworn into office, and that one of them, Zacheus Higby, junior, had signed his name without adding the junior. The court ordered the mandamus; holding that the clerk, a mere ministerial officer, had no right to decide on the acts of such officer *de facto*, and repeating the doctrine that the acts of officers *de facto* are valid *so far as the public and third persons are concerned*. I do not think that this case establishes much, on the point in question, to be decided. In *McInstry v. Tanner*, (9 *John*. 135,) on certiorari, one objection to the judgment was, that the justice was a minister of the gospel, and the proceedings therefore *coram non judice*. The justice denied this, in his return. The justice was *not a party* to the action, and this was a collateral question. The court held that even if the objection was true, the court could not take notice of such an objection; he was an officer *de facto*, and no such issue could be raised, repeating the qualified rule as above. The case of *Reed v. Gillet* (12 *John*. 296) was an action of debt on a judgment. The question decided was one of the sufficiency of evidence to sustain a judgment, and has in it no relevant point applicable to this case. The case of *Wilcox v. Smith* (5 *Wend*. 231) is also cited. That was a case where the action was also brought against a constable in trespass *de bonis asportatis*. He justified under an execution issued by a justice of the peace of Orleans county, upon a judgment rendered by him. The execution was regular on its face; the justice had been acting as such. The court repeated the well established doctrine that the acts of officers *de facto* are as valid, when they concern the public or the rights of third persons, as though they were officers *de jure*. The case cited from 6 *Binney*, 88, has no reference to the question decided in this case. The case of *Fowler v. Beebe*, (9 *Mass. Rep.* 221,) if it proves any thing, establishes the very converse of

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the principle for which it seems to be cited. It is a case where the defendant in an action put in a plea in abatement, setting forth that one Day, the deputy sheriff, who served the writ, was appointed such by one Smith, who claimed to be sheriff, and then set forth that Smith had not been legally appointed sheriff, and had no power to make such appointment. The plaintiff demurred, and the question was argued upon this demurrer, to wit, whether the service of the writ was legal. The sheriff was a ministerial officer. Parsons, Ch. J., said: "Smith (the sheriff) *is no party to this record*, nor can he be legally heard in the discussion of this plea, although our decision would as effectually decide on his title to the office *as if he were a party*." This would be judging a man unheard, contrary to natural equity and the policy of the law. From considerations like these has arisen the distinction between the holding of an office "*de facto*" and "*de jure*," and they held that it was sufficient that he was an officer *de facto*. But the court added, among other things, "if the action should be commenced against one claiming to be sheriff, for an act which he does not justify *but as sheriff*, *he would be a party*, and the legality of his commission might come in question, and meet a regular decision." Upon the cases above reviewed, it is argued and held that the circuit judge erred, in holding "*that it is not sufficient for the defendants in this action to prove that they were trustees de facto, merely; but that they must prove that they were trustees de jure*."

If this ruling was error, it is not because either of the above cases hold it to be so. Neither of them, except *Fowler v. Beebe*, touch that question, and that case, I think, *actually sustains the ruling*. It holds that when the officer is a *party*, and is sued for an official act, the legality of his title to the office might be decided. The question then is still open, so far as the above authorities are concerned, (except the last,) to be decided upon principle, and upon authority.

First, then, upon principle. There is no question which

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the courts have watched with greater jealousy, than the power conferred by statute upon individuals, upon corporations or upon bodies of inferior jurisdiction, to divest the citizen of his estate. Whenever this power is permitted to be exercised, the courts have been ever vigilant to confine the exercise of the power to the strictest rule of expressly specified limits; and when such a power has been exercised officially, the officer is bound to show his authority at every step, and his right to exercise the functions of his office. Nor does the law perceive any hardship in requiring the officer, who is bound to know whether he be one or not, to show by what authority he divests another of his estate. This is a safeguard demanded for the protection of private rights. There would be no safety without it.

It has been plausibly and ingeniously urged that this principle creates a great hardship in localities where trustees of school districts are often illiterate, or men of limited education, and the office, at best, an unthankful one, and that strict construction upon their acts makes it one even of peril. This may be true; but if the great safeguard of the citizen—the well established principle of protection to private rights—is to be made to bend to arguments "*ab inconvenienti*," we are at sea in dangerous navigation, without our compass.

2. Upon a most careful and deliberate review of cases, I am satisfied that the judge at the circuit correctly ruled on this point, upon authority. I have been unable to find a case decided in the courts of this state holding the law otherwise. I have found *strong*, well considered cases, not only in this state, but in several of the adjoining states, in point, and expressly laying down the same rule as did the judge at the circuit, and not one to the contrary. The case of *Blake v. Sturtevant* (12 N. H. Rep. 567) was an action of trespass, *de bonis asportatis*, against the selectmen, (whose office is substantially, in many respects, like that of school trustees,) for taking the plaintiff's oxen, and causing them to be sold, for the payment of taxes assessed by said selectmen for the

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purpose of building a school house. The defendants pleaded the general issue, and justification under a warrant to the collector, &c. The proof showed the defendants had been elected, but had not qualified. In deciding the question of liability, Upham, J. said: "The suit being against the selectmen for an illegal assessment, they must not only show jurisdiction, and a due assessment of the tax on their part, but that they were duly elected and qualified to act; in other words, that they are officers *de jure*." "This rule (he continues) is qualified now in those instances *where third persons are interested*, where it is merely necessary to show an officer *de facto*." "But the rule is correctly laid down in all the cases *where the individual sued is a party*; there he must be shown to be an officer *de jure*."

The case of *Schlenker v. Risley* (3 Scam. Ill. R. 483) was an action for false imprisonment. Caton, J. said: "The general rule of law is, where an officer justifies an act complained of *purporting to be done in his official capacity*, that it is necessary that he should aver and prove in his defense not only that he was an acting officer, *but that he was an officer in truth, and right*, duly commissioned to act as such; while as to all others, it is sufficient to aver and prove that he was acting as such officer; and the reason of the rule is, that the officer himself is bound to know whether he is legally an officer, and if he attempts to execute the duties of an office without authority, he acts at his peril. *Whereas it is sufficient, so far as the right of third persons or the public are concerned*, that the officer is acting in his official capacity, under color of title." In *Burke v. Elliott*, (4 Iredell's N. C. Rep. 355,) Ruffin, J. laid down the rule of law thus: "The acts of an officer *de facto* are good, *except, in an action against himself*; as to such acts as he undertakes to do as an officer." The case of *Riddle v. The County of Bedford* (7 Serg. & R. 386) was an action brought by a county treasurer to recover his fees. Duncan, judge, who delivered the opinion, said: "There are many acts done by an officer

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de facto that are valid. They are good as to strangers, and as to all those persons who are not bound to look further than the person in the actual exercise of an office; *but here the officer is the actual party to the action*; the distinction is sound." The officer had not proved his title to the office *de jure*, and it was held he could not recover. *Luffborough v. Parker*, (16 Serg. & Rawle, 351,) in the same state, was an action of ejectment. The defendants set up title in themselves, derived from a tax sale of the lands, and traced the title back to an assessment *made by the defendant as an assessor*, under which the sale took place. The defendant did not show that he had been sworn as an assessor. Gibson, judge, who delivered the opinion, said: "I am not going to wade through the learning, as to the competency of acts of an officer *de facto*, but I will take occasion to say here, that I have not the least doubt that as respects third persons, the acts of the assessor would be valid if he in fact had never been sworn." That however is not this case, and it was held that being a *party* he must show himself to have been an officer *de jure*.

In *Keyser v. M'Kissam*, (2 Rawle, 139,) Rodgers, judge, laid down the law thus: "The acts of public officers *de facto*, coming in by color of title, are good so far as respects the public, *but void when for their own benefit*."

In *Cornish v. Young* (1 Ash. 155) the question arose upon certiorari. It was held as follows: "The judicial acts of an alderman *de facto*, holding and exercising the office, can only be examined *in a proceeding in which he is a party, and can be heard*."

The case of *Cumming v. Clark et al.* (15 Verm. Rep. 653) was an action of trespass for taking a cow. The defendant justified under a warrant to collect a highway tax. The officer (surveyor) had been appointed to fill the office, *for the reason that the incumbent had refused to act*. Redfield, judge, said: "The refusal to act, is *not ipso facto vacating an office*. There is nobody to exercise a judicial discretion

on that subject, to declare the office vacant." "It is said (he continues) that the surveyor was an officer *de facto*, and therefore his acts are valid. This may be true so far as third persons are concerned, but not when the officer himself, or those under whose authority he is put in motion, are called upon to justify his proceeding. They must show his right to exercise the functions of the office." In the case of *Plymouth v. Painter*, (17 *Conn. Rep.* 589,) Storrs, judge, said: "The title of an officer *de facto* cannot be indirectly called in question in a suit to which *he is not a party*;" and he adds, at page 593, "although in a suit against a person for acts which he would have authority to do only as an *officer*, he must, in order to make out a justification, show that he is an officer *de jure*, because the *title* to the office being directly drawn in question, in a suit to which he is a party, may be regularly decided, so when he sues for fees, or sets up title to property, by virtue of his office, he must show himself to be an officer *de jure*" The case of *Fowler v. Beebe* (9 *Mass. Rep.* 231) we have already reviewed, showing that it recognizes and holds to the same distinction in the rule between actions directly against the party for his acts, and actions where only the public or third persons are concerned, as is found in all the cases from the other states. But while we have cited the cases, showing an entire uniformity of legal holding of the courts in the adjoining states, we have a remarkable concurrence in the adjudications of the courts of this state, on this point. (*Green v. Burke*, 23 *Wend.* 502, 503. *People v. White*, 24 *id.* 539, *per Walworth, chancellor*, and *Id.* 565, *per Root, senator*.) In the well considered case of *Savacool v. Boughton*, (5 *Wend.* 180, 181,) Marcy, judge, after the most thorough examination of the cases bearing on this point, says that where the inferior body either has no jurisdiction of the subject matter, or of the person, neither the court nor the party who procured the proceedings can derive any protection from them, when sued by a party aggrieved; and that a ministerial officer who executes process on the face of

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which it appears that the court had not jurisdiction, would be liable. In the case of *The People v. Hopson* (1 Denio, 579) there had been an attempt to show that the constable who executed the process had never taken the oath of office, nor given security. Bronson, judge, says: "this would be proper evidence, if the constable, instead of the people, was the party;" and after citing with approbation the cases in this state above referred to, he concludes: "When one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title." "And clearly (he says) he cannot recover fees or set up any right of property on the ground that he is an officer de facto, unless he be also an officer de jure." So in *Bentley v. Phelps*, (27 Barb. 527,) Smith, judge, recognizes the same distinction. He says: "An officer de facto can do no valid acts except as to third persons. The office, as is said in *Riddle v. Bedford County*, (7 Serg. & Rawle, 386,) is void as to the officer, but is valid as to strangers. The officer cannot protect himself except possibly in some few cases of ministerial officers. (See also *Baker v. Freeman*, 9 Wend. 42; *Benjamin v. Hull*, 17 id. 439, 440, in point.) Nor is this new doctrine: as long ago as the day of Lord Hardwicke, in the English courts, this was acknowledged law. In the case of *Smith v. De Bouchin et al.*, (2 Strange, 994,) the vice chancellor of the University of Oxford had issued a warrant to arrest the plaintiff upon a complaint, without a sufficient affidavit in that regard, to confer jurisdiction; upon which the plaintiff was arrested and imprisoned. The warrant was fair on its face. The plaintiff sued the vice chancellor, the officer making the arrest, and the jailer, jointly. They put in a joint justification. Lord Hardwicke was of opinion that the action of false imprisonment lay against the vice chancellor. That the other officers being ministerial officers, might have been excused, if they had justified separately, but that by joining with the vice chancellor they forfeited their justification, and judgment was given against the

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whole. This case is cited with approbation in *Pekin v Proctor*, (2 *Wils.* 383,) decided in 1768, and the court add these sensible remarks : " Although it may be thought hard to adjudge a man a trespasser in a case heretofore doubtful, yet the law cannot bend to particular cases ; and it is more for the general utility to suffer particular hard cases than to give usurped authority any effect at all. The hardship of particular cases is thereby most amply compensated to the public."

If then, upon authority, the court correctly decided that the defendants *being directly parties, and being sued as officers for an act done as such*, were bound to prove themselves officers *de jure*, then the other rulings in the case are unimportant, as no point is made or claimed that they were proved to be officers *de jure*; nor was there any offer to prove them such. It was not contended, or insisted, upon the trial, nor was the judge asked to charge, or decide, that they were officers *de jure*; nor to submit to the jury the question whether the defendants were officers *de jure*, and it should not now be decided upon a point not raised or discussed upon the trial, nor excepted to. The argument of my learned brothers, to this effect, to prove the defendants were officers *de jure*, is upon no point raised, or exception taken, in the case. No new trial can be had for that reason, if this argument is sound in that particular, even if we *could* now enter upon that field of speculation. It was not claimed on the trial that these trustees are such *de jure*. The plaintiff himself, it was shown by the records, had been elected a trustee for a term of three years ; he accepted the office, and had entered upon the performance of the duties of his office, and had acted. He had never resigned ; true, he did not act ; for what reason does not appear. That neglect or refusal did not vacate the office. (15 *Verm. Rep.* 653.) If he refused, it subjected him to a penalty, but could work no injury to the district ; the other two could notify him and then act without him. There is a penalty for refusing to *accept*, when

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elected. This refusal also subjects to a penalty; besides, it creates a vacancy. This was the case in *Randall v. Smith*, (1 Denio, 221.) Refusal to act after acceptance is a different thing. In the language of Redfield, judge, in *Cummings v. Clark*, (15 Verm. Rep. 653,) the refusal to act is not ipso facto vacating an office. There is nobody to exercise a judicial discretion to declare the office vacant. The defendants offered to prove they were acting as officers *de facto*, which was overruled, and excepted to. Afterwards in the course of the trial, they were permitted to prove this, and did prove it. If this was an error at first, it was subsequently cured. But if they had not afterwards been permitted to prove this, I can see no error in refusing to allow them to prove that which, if proved, the court correctly held would not constitute a defense, so it depends upon the legal ruling upon the main question in which this question is merged, whether this was right or wrong.

It is also argued, though the question does not arise in this case, that the title to an office cannot be determined in a collateral way. The proposition is true, if that is the *only* thing to be determined; but is not so to the extent claimed, upon the trial of such an issue as this. In all the cases above cited, it *was* so tried, and they all contradict that position. It is not necessary to discuss that question. Upon the defendants' theory they had no right to do the act, but by proving their *title de facto*. If they may prove this kind of *title* to an office in defense, may not the plaintiffs disprove it? What is the difference? In either case, of *title de facto*, or *de jure*, it is the trial of *title*; and is as easily proved or disproved in case of *title de jure* as in *title de facto*—as well in one case as in the other; and has been so admitted, and tried, in a hundred reported cases, and in most of those above cited. Although there are dicta to the contrary, there are no adjudged cases upon that point so conclusively settled otherwise.

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There is another question in the case, decided by the judge at the circuit, and excepted to, in which I think the ruling was error. It was held that the consent or certificate of the supervisor was a jurisdictional fact, and should have been obtained prior to the district meeting at which the appropriation to build the school house was voted. Such was the construction which had been given to the statute by the state superintendent of schools, and published in the "code of public instruction," and which holding was adopted by the judge in the haste of the circuit. I think, however, *Benjamin v. Hull* (17 Wend. 437) decides this the other way, and is authority to be followed. My learned brothers are undoubtedly right in their view of the law on this point. The trustees have no right or power to build upon a new site without the supervisor's authority; but I am satisfied such authority need not precede the vote. The question, however, upon this point of the case is entirely immaterial. If the other point was correctly decided, a new trial upon this point would be of no avail. The judgment must and would have been the same if the judge had decided this point the other way. It cannot therefore alter the matter. The case was all out, and if the judge had ruled this question the other way, the same judgment would have been directed. It was, therefore, and is, immaterial. A new trial upon that point would be useless.

Having come to the conclusion that the defendants did not justify their acts, they must fail. They made no preparation to prove themselves officers *de jure*, nor offer to prove any thing that was not proved. Both parties adopted the same law, and the same facts, as their full case; one that it was sufficient to show the defendants officers *de facto*, the other that it was insufficient. No other theory was claimed or discussed on the trial. The judge did not pass upon any other. No other should now be attempted to be spelled out or inferred. It would not help the defendants to order a new

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trial upon the ruling as to the supervisor's certificate. This is a *case*. If the judge was right on the main question, as I think he was, the judgment should be affirmed.

New trial granted.

[WARREN GENERAL TERM, July 10, 1860. *James, Rosekrans and Potter, Justices.*]

SANDERS vs. LEAVEY.

A lease, given by the corporation of New York, furnishes no evidence of the existence of the facts necessary to warrant proceedings to effect a sale of land for taxes or assessments; but after those facts have been established, and the proceedings for a sale of the premises have been ordered and commenced by advertisement, any irregularity which may occur in the proceedings will be cured by the lease.

The omission to specify, in a notice of sale, the person to whom the payment of the tax is to be made, will not affect the regularity of the sale. All that is necessary, under sections 9 and 10 of the act of 1840, is a mere notice of the sale, embracing the time and place.

The certificate of the street commissioner that an affidavit of the service of the redemption notice required by the statute to be served upon the occupant or person last assessed as owner, has been filed with him, and that he is satisfied such notice has been served, though it may be sufficient to afford *prima facie* evidence that such affidavit was filed with him, and that the money remained unpaid, furnishes no evidence that the act has been performed which was necessary to give effect and vitality to the lease.

Notice to the occupant, &c. default in payment, and the certificate of the street commissioner that the payment required has not been made, are all necessary to be shown, by the purchaser at an assessment sale, as a condition precedent to the validity of the lease.

THIS was an appeal from the decision of a referee in an action of ejectment, brought by the appellant to recover from the respondent the possession of a lot of ground, situated on the northerly side of 29th street, 125 feet easterly from Lexington avenue, in the city of New York. It was

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admitted on the trial that the lot in question was, on the 31st day of March, 1842, in the possession of Asa Bigelow, jun. as owner in fee. On that day a judgment for \$7004.08, recovered in the supreme court against said Asa Bigelow, jun. in favor of James G. King and others, was docketed in the office of the clerk of the city and county of New York. On affidavits and notice of motion, an order was duly made in the supreme court, on the 14th day of February, 1852, directing the issuing of an execution on said judgment. An execution was duly issued, and on the 18th day of February, 1852, was delivered to the sheriff of the city and county of New York, who sold the premises in question together with three other lots, on the 1st day of April, 1852, to Justin A. Edwards, the highest bidder. On the 6th day of April, 1852, the sheriff filed in the office of the clerk of the city and county of New York, a certificate, duly executed, dated April 1, 1852, setting forth, in the usual and due form, said sale, &c. On the 15th day of July, 1853, the sheriff delivered to said Justin A. Edwards, the purchaser, a deed duly executed, conveying the lot in question together with the three others bought at said sale. On the 7th day of April, 1857, the said Justin A. Edwards and Octavia C. his wife, in consideration of \$4000, conveyed by deed the lot in question together with the three others purchased at said sheriff's sale, to Elizabeth E. Sanders, the plaintiff in this suit. The foregoing constituted the title of the plaintiff to the lot in question. Two grounds of defense were set up against the title of the plaintiff. 1. A lease of the premises in question to William A. Walters, for the term of thirteen years, dated March 6, 1848, duly assigned by Walters to J. L. Tiffany, and by Tiffany to the defendant, purporting to be given by the corporation of the city of New York, pursuant to a sale made on the 4th day of March, 1846, for the non-payment of an assessment for regulating and paving 29th street. The lot was assessed to Asa Bigelow, jun. 2. An assignment, dated June 1, 1843, made by Asa Bigelow, jun.

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to a receiver, in obedience to an order of the court of chancery, dated May 23, 1843, granted on an ordinary judgment creditor's bill. The creditor's bill was founded on a judgment for \$12,613.17, recovered in the superior court of the city of New York, against the said Asa Bigelow, jun. in favor of William Couch, and docketed in the office of the clerk of the city and county of New York, on the 20th day of April, 1842, and an execution issued thereon and returned unsatisfied. The referee having found that "the plaintiff had established *prima facie* a legal and possessory title to the premises," that "the title in the receiver is not a valid outstanding title," but that the corporation assessment lease was "a paramount and subsisting legal title in the defendant," the case came up solely upon the exceptions taken to the finding and decision of the referee in favor of the validity of said assessment lease.

H. P. Townsend, for the plaintiff.

Henry G. DeForest and *A. Melville*, for the defendant.

By the Court, INGRAHAM, P. J. The question submitted to us in this case arises upon a sale by the corporation of the property of the plaintiff for non-payment of an assessment. Objections were taken before the referee, and were urged upon the court on this appeal, to the proceedings taken prior to the sale, as not being in conformity to the statute, and therefore as being void and giving no title. Before examining them separately, it may be well first to ascertain to what extent such errors are fatal to the proceedings, and when they are cured by the lease given after the sale.

By the act of 1816, chap. 115, it is provided that the lease to be given on the sale of lands for taxes or assessments, shall be conclusive evidence that the sale was regular according to the provisions of the act. The distinction must be observed between what is necessary to give jurisdiction and

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what is a mere irregularity in the proceedings. In the latter case, the lease would cure the irregularity, but it could have no effect to confer jurisdiction, if the necessary steps for that purpose had been omitted. By matters necessary for jurisdiction, we must at any rate understand all such steps as were necessary to be taken prior to the act of the corporation directing the advertisement for the sale. This was held in the cases of *Whitney v. Thomas*, (23 *N. Y. Rep.* 281,) *Leggett v. Rogers*, (9 *Barb.* 408,) where it was said that the deed was not *prima facie* evidence of the preliminary steps giving authority to sell; in *Varick v. Tallman*, (2 *Barb. S. C. Rep.* 113,) and in *Tallman v. White*, (2 *Comst.* 66,) where Ruggles, J. says: "The comptroller's deed is conclusive evidence of the regularity of the sale, but not of the right and power to sell. It is not evidence of the facts which conferred upon him power to sell."

Although these cases were in regard to lands sold in other parts of the state, the same principle is involved, because the statute makes the comptroller's deed in those cases, as it does the lease in the city of New York, conclusive evidence that the sale was regular.

In *Doughty v. Hope*, (1 *Comst.* 79,) the decision of the supreme court was affirmed, for the reasons assigned by that court. And in that case (3 *Denio*, 594) it was held that the legislature had reference to the auction at which the incipient right of the purchaser was acquired, and it was also held that it did not apply to the subsequent steps by which that right became perfect. The same distinction was taken in *Striker v. Kelly*, (2 *Denio*, 323,) viz: that the lease was not evidence of the authority to sell, although it was of the proceedings by which the sale was effected.

From these decisions I think the rule may be considered as settled, that the lease given by the comptroller furnishes no evidence of the existence of the facts necessary to warrant proceedings to effect a sale for taxes or assessments; but that after those facts have been established and the proceed-

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ings for a sale of the premises have been ordered and commenced by advertisement, then that any irregularity which might occur in those proceedings would be cured by the lease.

The first objection taken to the regularity of the proceedings and the authority of the street commissioner to sell, was that the proper notice of sale was not given. The statute required notice of the sale to be given in ten papers. By the act of 1830, chap. 2, (*Davies' Laws*, p. 700,) it was provided that the notice should require the owner of the land to pay the amount due to such person as might be appointed, &c. to collect the same; but by the act of 1840, (*Davies' Laws*, p. 833, § 9,) it was provided that notice of the sale should be published once in each week for three months in ten papers, one of which should contain a detailed statement and the others should refer thereto. This does not require in the nine papers any further notice than of the sale (embracing the time and place) and the paper in which the detailed statement is published. The counsel for the appellants, however, urges that this notice must contain all that was necessary under the act of 1830, except of the property to be sold. This objection is answered by a reference to the tenth section, which says it shall not be necessary to give any further publicity of the intended sale than is contemplated by the preceding section; which was a mere notice of the sale.

The omission, therefore, of the general notices of sale to state the person to whom the payment of the tax was to be made, did not affect the regularity of the sale.

If it was an irregularity, then I think it would come within the defects cured by the lease. The provisions of the act of 1843 apply only to sales for taxes, and are not applicable to sales for assessments, and therefore do not affect this case.

The objection to the sale that the proper affidavits were not made by the collector previous to the passage of the resolution directing the sale, is not well taken. The affidavits proven are sufficient within the provisions of the act

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of 1816, chap. 115, § 2. (*Davies' Laws*, p. 598.) The first section of that act does not apply to sales for assessments, but only for taxes, and the provision of that section requiring the affidavit to be in form as specified in section 11 of the act of 1813 is not applicable.

It is also objected that after giving the lease by the street commissioner, the notice required by the statute to be served upon the occupant or person last assessed as owner, was not shown to have been served, as required by the statute of 1841. (*Davies' Laws*, p. 843, and 1843, p. 875)

It was held in *Doughty v. Hope*, (3 *Denio*, 594,) that the lease was not evidence of any of the steps necessary to be taken after the sale, by which the right acquired by the sale could be made perfect; and it becomes necessary, therefore, in order to make the title by the lease valid, to show that such notice was given and proof thereof filed with the street commissioner, sufficient to satisfy him that such service had been made.

There was no evidence on the trial, of any service of such a notice, nor was the affidavit of such service, supposed to have been filed with the street commissioner, produced. The referee, however, has found that the notice was served, and that the affidavit was filed with the street commissioner. These findings are based upon the certificate of the street commissioner that the affidavit had been filed with him, and that he was satisfied such notice had been duly served. The referee appears to have considered the certificate conclusive on those matters. There is nothing in any of the statutes referred to which makes this certificate conclusive evidence as to the matters therein stated, or as to the regularity of the proceedings, as the case is. If it is to have such an effect, it can only be by inference from the wording of the statute. This provides that if the officer, with whom the affidavit is to be filed, shall be satisfied by such affidavit that the notice has been served, and if the moneys required to be paid for the redemption of such land, &c. shall not have been

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paid, he shall certify to the fact, and the conveyance shall thereupon become absolute. I do not think the certificate of the street commissioner is to be construed as having such an effect. The affidavit is to be filed with him, and if it (the affidavit) satisfies him that the notice has been served, and if the money has not been paid, he is to certify the fact, &c. What fact? The referee thinks the word "fact" means all that the commissioner has to be satisfied of. Even conceding this to be so, it does not follow that it furnishes any evidence that such notice was served. It may be sufficient to afford prima facie evidence that such affidavit was filed with him and that the money remained unpaid, as these matters were within his own knowledge, but it furnishes no evidence that the act had been performed which was necessary to give effect and vitality to the lease.

In *Jackson v. Esty*, (7 *Wend.* 148,) Ch. J. Savage says it was necessary for the purchaser, to complete his title, to show by due proof that such notice was given, and by the certificate that the payment required, &c. had not been made. And in *Bush v. Davison*, (16 *Wend.* 553,) Cowen, J. states that the notice, default, proof and certificate are all necessary to be shown as a condition precedent to the validity of the lease.

I think that the referee erred in his conclusions upon this point, and that a new trial must be ordered.

New trial granted.

[NEW YORK GENERAL TERM, November 3, 1862. *Ingraham, Leonard and Peckham*, Justices.]

FREDERICK M. PECK, *appellant*, vs. FERDINAND E. CARY
and others, *respondents*.

Where the person who drew a will called the subscribing witnesses from an adjoining room, in the presence and hearing of the testator, who had already affixed his signature, and requested them to witness the will; the testator seeing the witnesses come into the room and there sign the instrument, as witnesses of its execution, he making no sign of dissent; *Held* that what was said by the scrivener must be considered as adopted by the testator as his own act and language; and that there was a sufficient acknowledgment and publication of the will, and request to the witnesses.

THIS is an appeal from a decree of the surrogate of the county of New York, admitting to probate the last will and testament of Robert S. Peck, deceased, as a will of real and personal estate. The appellant claimed to be the sole heir at law and next of kin of the deceased, and appealed on the grounds that the execution of the alleged will was not duly proved; that it was affirmatively established that the paper was not duly executed as a will, and that Robert S. Peck had no testamentary capacity at the time the paper was signed. The proof, as to the execution of the will, was as follows: Edward D. Clapp, one of the witnesses, testified that he had seen the will before; that he saw it in the Quinnebago Bank, in Norwich, in 1858; in the early part of the summer; the president was Mr. Morgan; "the name of Edward D. Clapp is in my handwriting; Mr. Morgan, the president, Mr. Robert Peck, Mr. Huntington and Mr. Meech were present at the execution; I was in the bank to deposit; as I turned to leave, Mr. Morgan requested me to witness Mr. Peck's will; I was within ten feet of Mr. Morgan when that request was made, going out of the door; Mr. Morgan called me to him; Mr. Morgan was seated at a table, in the rear of the bank, when he made that request; I went to him; Mr. Peck was near the table; we were all very near each other; Mr. Morgan then remarked that Robert was about making his will; that he was going to sea, and wished to make his will before he went, and he wished me to witness it; Robert

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said nothing; I stepped up and witnessed the instrument, at the same time I fixed my name; I turned to Mr. Peck and said, 'I hope you have left me a good slice;' I remarked this pleasantly; he made no verbal response; nodded and smiled; I left the room." Mr. Huntington (another of the witnesses) testified that he was called upon to sign his name as a witness by Mr. Morgan or Mr. Peck, and says, "I was told it was Robert's will," by whom he could not recollect. Mr. Meech (another of the witnesses) testifies that he signed his name as a witness, at Mr. Morgan's request; that *Mr. Morgan requested him to sign the paper as a will*, and that the testator, he should think, was ten feet off, evidently within hearing distance. Mr. Morgan, who drew the will, testifies that the testator sat by him when he was drawing it, and that he either read it to him, or that the testator himself read it; that he suggested the necessity of witnesses, and called and requested the witnesses to sign it, the testator not being more than three or four feet off; that he heard the pleasantry of Mr. Clapp in reference to being left a slice.

H. A. Cram, for the appellant. •

John Graham, for the respondents.

LEONARD, J. 1. We can find nothing in the proof, or in the provisions of the will, to warrant the conclusion that the testator's own mind was not fully and freely expressed.

2. The person who drew the will called the subscribing witnesses from an adjoining room, in the presence and hearing of the testator, who had already affixed his signature, and requested them to witness the will. There is no evidence showing any want of consciousness or intelligence of the testator, sufficient to incapacitate him from performing the act in question at this time. He said nothing in words, but sufficient transpired to show that he understood the business in which he was engaged. What was said by Mr. Morgan must

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be considered as said by the testator. He heard it, saw the witnesses come into his presence, and there sign the instrument as witnesses of its execution by himself. He gave no sign of dissent, but carried out the execution in the manner indicated by the request of Mr. Morgan to the witnesses, made in his hearing and presence. If the testator had been the speaker himself, and addressed the same language to the witnesses which was used by Mr. Morgan, in his hearing, there can be no doubt that within the case of *Coffin v. Coffin*, (23 N. Y. Rep. 9,) it was a sufficient acknowledgment and publication of the will, and request to the witnesses.

What was said by Mr. Morgan was adopted by the testator as his own act and language. I think the whole proceeding, on the occasion of the execution of the will, warrants this conclusion.

The decree appealed from should be affirmed with costs.

INGRAHAM, P. J. I concur in the above decision, not because the provisions of the statute have been complied with, but because the decisions of the court of appeals, on similar questions, render a contrary decision unavailing. The statute, I think, requires something more than a mere silent acquiescence in what a bystander says.

BARNARD, J. I think the decree of the surrogate should be reversed, and the matter sent before a jury to try the competency of the testator to make a will.

Decree affirmed.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Barnard*, Justices.]

SHULTERS and others *vs.* JOHNSON and others.

A testator, by his will, gave and bequeathed to his two daughters, each, the sum of \$200, to his son G. the sum of \$400, and to his son D. the sum of \$50, and lastly, he gave and devised all the "*rest, residue and remainder*" of his real and personal estate, goods and chattels, to his two sons J. and D. M. to be divided equally between them, share and share alike. There was in the will no express charge of the legacies upon the real estate, and there was no fund created out of which they should be paid, and no direction as to when, or by whom they should be paid. Nor was there any specific devise of any portion of the real estate. The testator was seised of real estate of the value of several thousand dollars, but did not leave personal property sufficient to pay any portion of the legacies.

Held that it was the intention of the testator that the legacies should be paid out of whatever property he should leave, and that only the residue, after their payment, should go to the residuary legatees. JOHNSON, J. dissented.

APPEAL from a judgment entered on a decision of the court at special term, adjudging that certain legacies given by the will of Amos Dawley were not chargeable upon the real estate of which he died seised.

The will, so far as it relates to the disposition of property, is in the following form :

"First. I give and bequeath to my daughter Almira the sum of two hundred dollars.

Second. I give and bequeath to my daughter Sally Eliza the sum of two hundred dollars.

Third. I give and bequeath to my son George the sum of four hundred dollars.

Fourth. I give and bequeath to my son Duty M. the sum of fifty dollars.

Lastly. I give and devise all the rest, residue and remainder of my real and personal estate, goods, and chattels of what nature and kind soever, to my two sons J. J. W. Dawley and Daniel M. Dawley, to be divided equally between them, share and share alike; and I do hereby appoint Stephen B. Tidd my sole administrator of this my last will and testament."

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The testator died seised of lands of the value of several thousand dollars, but (as is found by the court) did not leave sufficient personal property to pay the legacies "in whole or in part."

The plaintiffs, Sally Shulters and Almira Parks, are the daughters of the testator, to each of whom \$200 is bequeathed by the will, and they seek to have the same declared a charge on the lands devised to J. J. W. Dawley and Daniel M. Dawley, and now held by other parties, defendants herein. Nothing is said in the will as to how, when, or by whom the legacies are to be paid.

J. Van Voorhis for the appellants.

E. G. Lapham, for the respondents.

DAVIS, J. "The real estate," says Chancellor Kent, in *Lupton v. Lupton*, (2 John. Ch. 623,) "is not as of course charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and disposition of the will." This intent "will be effectual when found to exist in any form, because the law seeks only to discover and carry out the purposes of the testator." (*Per Johnson, J.*, 16 N. Y. Rep. 262.) In ascertaining that intention we are to be governed, so far as practicable, by the rules of construction as settled in such cases by the courts, and we are at liberty to look at the circumstances surrounding the testator at the time of making the will, as tending to shed light upon the intent with which he used its language. It is important also to bear in mind that there is no sound reason why a pecuniary legacy should take effect sooner than a devise of lands; and therefore, unless a reason can be found in the manifest intention of the testator, the legacy is entitled to no preference over the devise.

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In the will in question there is no express charge of the legacies upon the real estate; and there is no fund created out of which they shall be paid, and no direction as to when, or by whom they shall be paid. The intention to charge them, if it exist, must be inferred from the language and dispositions of the will interpreted in the light of the rules above referred to and of the various authorities on the subject.

The testator in this case was seised of real estate of the value of several thousand dollars, but, as the court has found, did not in fact have personal property sufficient to pay any portion of the legacies given by him. He bequeaths in plain and distinct terms, the several pecuniary legacies to the plaintiffs and others, but makes no specific devise of any portion of his real estate. When we reach the residuary clause of the will, we find his entire real estate (unless it is affected by the legacies) wholly undisposed of. It is all devised, if at all, under the phrase "*the rest, residue and remainder of my real and personal estate.*" The words *rest, residue and remainder* appertain here as well to the realty as to the personalty, and yet it is manifest that unless the testator intended his real estate should be affected by the legacies, there was nothing correctly answering the description of the phrase. The whole of his real estate is not the rest, residue or remainder of it. Something must be taken from the entirety to reduce it to a rest, residue or remainder; and therefore where a testator has devised by that phraseology, the mind naturally recurs to the antecedent portions of the will to ascertain what has created *the rest, residue and remainder* thus disposed of. If we find that those terms, as applied to the property bequeathed and devised by them, are satisfied by the preceding dispositions of the will, then the inference that the testator only meant by them to dispose of what was left of his estate after making previous bequests and devises, so that he should die intestate as to none of it, justly arises. But if we find no antecedent devise by which the real estate of the tes-

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tator is made to answer the description of the residuary clause, it seems to be natural and just to infer that the testator intended to reduce it to that description by charging the legacies upon it, if that course should be necessary to their payment. Upon a careful examination the authorities will be found to sustain these views. *Lupton v. Lupton*, (2 John. Ch. 614,) is the leading case, and the recognized law of this state. It is claimed that the rule laid down in that case is decisive against the plaintiffs in this case; but a careful examination will show that this is an error. In that case the testator gave several legacies to his grandchildren, payable when they should respectively arrive at the ages of twenty-one and twenty-five years. *He also made certain specific devises of real estate to his said grandchildren*, and then gave and devised to his three children, after the decease or marriage of his wife &c., "all the rest, residue and remainder of my real and personal estate not hereinbefore already devised and bequeathed." The chancellor says; "If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause, and a kind of formula in wills. It means only when taken distributively, *reddendo singula singulis*, that the rest of the personal estate not before bequeathed is given to the residuary legatees, *and that the remainder of the real estate not before devised is in like manner disposed of*. It means that the testator does not intend to die intestate as to any part of his property, and it generally means nothing more." The chancellor cites and chiefly relies upon *Keeling v. Brown*, (5 Vesey, 359,) as showing that this construction is perfectly well settled. The will then directed the debts and funeral expenses to be paid, *and devised several parts of his real estate*. The testator then gave pecuniary legacies, and then gave and devised to B. "all the rest, residue and remainder of his estate and effects whatsoever, whether real or personal." The master of the rolls held that the legacies were not chargeable upon

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the real estate. The decision in *Lupton v. Lupton* has never been overruled in this state, and is undoubtedly the sound rule of law in such cases. But it will be observed that both that case and *Keeling v. Brown*, to which it refers, differ from the present in a very essential particular. Both those cases not only contained antecedent legacies, but also antecedent specific devises of portions of the testator's real estate. There was therefore something in the will which reduced the real estate devised by the residuary clause to the description there given; and to which the language of that clause was distinctly referable. The chancellor's rule of construction, therefore, properly applied to it: but in this case it cannot be properly applied. In this will there are no previous devises; and the clause "the rest, residue and remainder," cannot be taken, distributively *reddendo singula singulis*, and held to mean that the rest of the personal estate not before bequeathed is given to the residuary legatees, and that the *remainder of the real estate not before devised* is in like manner disposed of. On the contrary, we are obliged in this case to say that the phrase "*rest, residue and remainder*" of the real estate *means the whole*, because of the absence of any previous disposition, and not that it means only what is not before devised; as the chancellor was able to say in his case: or we are obliged to say that the testator did not intend to use this inapt phraseology to indicate the whole of his real estate, but because his purpose was that his residuary devisees should only have what was left of both his real and personal property, after his other children should get their trifling legacies. *Lupton v. Lupton* does not, therefore, lay down any rule which controls the case at bar; nor does the rule that properly applies to this case conflict with that eminent authority.

The case of *Tracy v. Tracy*, (15 Barb. 504,) decided at special term by Mason, J. seems, so far as the facts can be gathered from the report, to have been precisely analogous to

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the present. The learned justice in that case thought that *Lupton v. Lupton* was decisive "unless the blending and combining the real and personal estate in one devise in this case should be held to give a different construction to the will." He did not advert to the distinction above pointed out between the case before him and that presented by *Lupton v. Lupton*, but determined that the legacies were a charge, upon the ground that the real and personal estate were blended in one devise to the same person.

In *Reynolds v. Reynolds' Ex'rs*, (16 N. Y. Rep. 257,) the case of *Tracy v. Tracy* is referred to by Bowen, J. in the leading opinion in the case. He says: "As the devise was of the rest, residue and remainder of the estate, the decision is sustained by the authorities, but I think it was put upon a wrong ground. In the cases of *Bench v. Biles*, (4 Madd. 187;) *Hassel v. Hassel*, (2 Dick. 526;) *Brudenel v. Boughton*, (2 Atk. 268;) *Cole v. Turner*, (4 Russ. 366,) and *Nichols v. Postlethwaite*, (2 Dall. 131,) real and personal property were bequeathed together, and the real estate was charged with legacies, not on the ground of the blending of the two kinds of property, but because in each, the rest, residue and remainder of the property was devised and bequeathed. The learned justice cites *Lupton v. Lupton* in the course of his opinion, as undoubted authority, and it is obvious that he must have regarded *Tracy v. Tracy* as not in conflict with that case, as otherwise he could not have concluded that it was correctly decided for the reason above quoted. *Reynolds v. Reynolds* cannot however be considered as authoritative in this case, because the point here involved was not there presented.

A reference to the English authorities will show that in cases analogous to this the legacies have been charged on the real estate. Most of the English cases have grown out of the incessant struggle of the courts to make men honest in their graves, by subjecting their real estate to the charge of their

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debts. An analysis of these cases, though highly instructive, is not required in this; an able summary and examination of them may be found in 2 *Jarman on Wills*, 362 *et seq.*

But in *Hassel v. Hassel*, (2 *Dick.* 526,) the present point was quite distinctly involved. There the testator bequeathed certain legacies, and then devised and bequeathed all his real and personal estate *not thereinbefore disposed of*. Lord Bathurst held that the legacies were charged upon the real estate. The language of the will in that case was not stronger than a devise of "the rest, residue and remainder." Both phrases are substantially alike in their significancy. In *Bench v. Biles*, (4 *Madd.* 187,) the testator gave all his real and personal estate to his wife for life, and after her decease various legacies, and then all the rest, residue and remainder of his real and personal estate to his nephews, share and share alike, &c. Sir John Leach, V. C. held that the legacies were a charge on the lands, "considering the intention of the testator to be clearer than in *Aubrey v. Middleton*, (2 *Eq. Cas. Abr.* 479.)" "The testator," he said, "here gives all his real and personal estate to his wife for life, blending them together as one fund for her use, and after her death he gives several pecuniary legacies, and then the rest, residue and remainder of his real and personal estate to his nephews. He plainly continues after his wife's death to treat them as one fund, the rest, residue and remainder of which, after payment of his legacies, is to go to his nephews." This case is open to the same criticism which Mr. Justice Bowen applies to *Tracy v. Tracy*: and it may be remarked that *Aubrey v. Middleton* was not an authority for the decision, because in that case the executor was himself the devisee of the real estate, and he was expressly directed to pay legacies and annuities. *Hassel v. Hassel*, (*ubi sup.*) is more directly in point. In that case there was no precedent gift affecting the real estate to which the words "not hereinbefore disposed of" could be referred; while in *Bench v. Biles* the words rest

and residue might have had reference to the devise of the real estate to the wife for life. (*See 2 Jarman on Wills*, 380.)

In *Cole v. Turner*, (4 *Russ.* 376,) it was held that a bequest of legacies followed by a gift of all the *residue* of the testator's real and personal estate, operated to charge the entire property with the legacies; and in *Morehouse v. Scaife*, (2 *Myl. & Craig*, 695,) "where the testator, after bequeathing certain pecuniary legacies, declared his will to be that all his debts and all the above legacies should be paid within six months after his decease, and all the *residue* of his estate both real and personal, lands and messuages and tenements, the testator gave to A., by her to be freely possessed at his decease, it was held by the vice chancellor, and afterwards by the chancellor on appeal, that by these words the real estate was charged as well with the legacies as the debts.

Neither in this case nor in *Cole v. Turner* was there any previous specific devise of real estate to which the term *residue* might be referred. And this fact is noted as worthy of remark by the learned author above cited. (2 *Jarm.* 380.) In *Morehouse v. Scaife*, it is true, there was an express direction that the legacies should be paid within six months; but in *Lupton v. Lupton* it is held that a mere direction that legacies be paid is not sufficient to make them a charge. The absence or presence of such a direction cannot justly affect the question, unless the person to whom the direction is given is also the residuary devisee.

In the case of *Lewis v. Darling*, (16 *How. U. S. Rep.* 1; 21 *Curtis*, 1,) this question was considered by the court. In that case Betts, the testator, bequeathed to the complainant Darling a legacy of \$2500. He left but one child, a daughter, who intermarried with the defendant Lewis. She was his residuary legatee under a clause of the will in these words: "And as to all the rest and remainder of my property, debts, rights and actions, of what kind and nature soever, that may belong or appertain to me, I name and appoint, as my sole

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and universal heiress, Maria Margaret Betts, my lawful daughter, in order that whatever there may appear to appertain and belong unto me, she may have and inherit the same with the blessing of God and my own." It was held that the legacy to Darling was a charge upon the real and personal estate that passed under the residuary clause. "The rule in such case is," say the court, "that where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of his whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case the residue can only mean what remained after satisfying the previous gifts. (*Hill on Trustees*, 508.) Such is the settled law both in England and in the United States, though cases do not often occur for its application." The rule above cited is substantially and almost literally as it is laid down by *Hill on Trustees*, at page 360, citing the English cases above alluded to, and a large number of authorities are also cited by Justice Wayne, to sustain his position. *Lupton v. Lupton* has been supposed, he says, to conflict with this rule, but it does not do so; for there it is said to be dependent upon the (intention of the) testator." The remark is correct so far as *the rule above quoted is concerned*, but it is not easy to see that *Lupton v. Lupton* is consistent with the conclusion of the court in *Lewis v. Darling*, for in both cases there were *antecedent specific devises*. It should be noticed, however, that the rule cited from *Hill on Trustees* supposes a case where legacies are given and then a residuary clause disposing of both real and personal estate; and not one where there are antecedent specific devises of the real estate to which the residuary language may be referred for construction, according to the rule laid down in *Lupton v. Lupton*.

Van Winkle v. Horton, (2 *Green. Ch. R.* 172,) is very strongly in point. In that case, after giving several legacies, the testator gave the rest, residue, and remainder of his estate

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real and personal to his two daughters. There was no specific devise of lands. It was held that the legacies were a charge on the real estate. The chancellor refers to *Lupton v. Lupton*, and says of that case, "A part of the real estate had been disposed of, so that the words residue and remainder of my real estate had their appropriate and strict 'meaning.'" And again referring to the same authority he says; "In another point the case was dissimilar from the present. There were several specific devises of real estate before the residuary devise, and consequently there was something for the residuary clause to operate upon without inferring that the testator supposed that a part of the real estate would be needed to pay the debts and legacies."

In *Rafferty v. Clark*, (1 *Bradf.* 473,) the will directed the payment of the debts of the testator and then gave three legacies; after which it gave and devised all the rest, residue, and remainder of the estate real and personal not thereinbefore disposed of, to the persons and in the proportions thereafter named. There was a deficiency of the personal property to pay the debts, and after a sale of the real estate for that purpose, the question arose upon the disposition of the surplus. The learned surrogate held that the deficiency to pay legacies was chargeable on the real estate. "The term residue applies," says he, "as much to the real as to the personal estate, and unless the legacies be considered as intended to be charged on the real estate, there is no previous disposition of the real estate."

And see further on this point, *Webb v. Webb*, (2 *Barnard*, 86;) 2 *Eq. Cas. Abr.*; *Elliott v. Hancock*, (2 *Vern.* 143.)

The position that the blending and combining of the real and personal estate in the same clause of the will is sufficient to charge the real estate with the payment of legacies, was disapproved by Bowen, J. in *Reynolds v. Reynolds*, (16 *N. Y. Rep.* 261.)

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There are many authorities, however, which seem to sanction the views of Mason J. in *Tracy v. Tracy* on this point. Without intending to review the cases, it may well be doubted whether the blending in the ordinary form of the residuary clause of a will can *per se* have such an effect. Such a general rule would often give to a residuary clause an effect beyond the intention of the testator; as where his purpose is merely by a general disposition to prevent intestacy as to any part of his property. It would overturn the rule of interpretation given by *Lupton v. Lupton*, and which is to be applied when antecedent bequests and devises show that the rest, residue and remainder are referable to them for construction. But in a case like the present the blending of the real and personal property into one "*rest, residue and remainder*," may well serve to illustrate the intention of the testator to have that created by first satisfying the legacies previously given; otherwise the rest, residue and remainder of the real estate devised, must be construed to mean the whole of the lands of which the testator dies seised—an idea which could have been more readily expressed in briefer words.

It is not therefore because the residue of the estate real and personal is blended together and disposed of as one fund, that previous legacies are charged, but because in the absence of *specific devises, the blending of the entire estate into one residue*, after giving legacies, indicates an intention of the testator to give only the *residue* which would be created when the previous dispositions of his will should be satisfied.

Taking into view the circumstances that surrounded this testator—the fact that his property consisted chiefly if not wholly of lands—the doubt that that fact must have given rise to, whether the legacies could be paid out of his personal property—the fact that he was cutting off his other children with trifling legacies, and bestowing on two of them the great

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bulk of his estate, I am strongly impressed with the belief that it was his intention that these legacies should be paid out of whatever property he should leave, and the residue, only, after their payment, should go to his residuary devisees. This view is strengthened by the fact that his will makes no provision for the payment of debts, so that it cannot be said he supposed the rest, residue and remainder might follow from their payment; but for legacies alone, without the payment of which no rest, residue or remainder could arise under the will. It is my opinion, therefore, that the judgment should be reversed and a new trial granted, or that a judgment should be rendered by this court upon the facts found, charging the payment of the legacies as shall be equitable, upon the lands, &c.

The judgment should be reversed and a new trial ordered.

WELLES, J. concurred.

JOHNSON, J. dissented.

Judgment reversed.

[MONROE GENERAL TERM, December 1, 1862. *Johnson, Welles and Davis, Justices.*]

ADAM H. HAGER *vs.* DANIEL HAGER.

Requisites and validity of a complaint under the title of the revised statutes respecting "Proceedings to compel the determination of claims to real property in certain cases," as amended by subsequent statutes and modified as to the forms of proceeding, by the code.

In such an action, proof that the premises in question were assessed to the plaintiff, as owner, is admissible, as tending to show a claim thereto on his part, somewhat open and notorious, and to give practical character to his assertion of title.

In such an action it is not erroneous to charge the jury that in case they find the plaintiff has no title to the premises, and they for that reason find for the defendant, they may proceed one step further, and determine whether the defendant has title to the whole, or to any and what portion thereof.

Nor is it erroneous to charge that the non-production of a deed (alleged to contain a material clause fraudulently inserted) in the defendant's possession, and purposely suppressed by him, and containing evidence bearing strongly on the question of fraudulent insertion, is a circumstance from which they may pronounce against the defendant, as to that clause.

It is the duty of the county clerk to record the memorandum of alterations and interlineations in a deed; and it is not erroneous in a judge to charge the jury that the absence of any such memorandum, in the record, is a circumstance for their consideration in connection with the question of an alleged fraudulent insertion in the deed.

What irregularities in the conduct of a jury will not be sufficient grounds for a new trial.

THIS was a motion for a new trial, upon exceptions, ordered to be heard in the first instance at the general term. Also an appeal from an order of a special term, denying a motion to set aside the verdict for irregularity. The facts are sufficiently stated in the opinion of the court.

Lyman Tremain, for the plaintiff, (respondent.)

Henry Smith, for the defendant, (appellant.)

By the Court, HOGEBOM, J. The complaint in this action sets forth that the action is brought pursuant to chapter 5, part 3, title 2 of the revised statutes, entitled "Proceedings to compel the determination of claims to real property in certain cases," and in pursuance of the code of procedure;

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and alleges that the plaintiff is and has been possessed of, and the owner in fee, and still is, of a part of lot No. 12, lying and being in a patent granted to George Clark, beginning on the west bank of the Schoharie creek, (describing the same,) tracing the title thereto down from about the period of the declaration of independence to the time of the commencement of the action, in 1859; alleging that the plaintiff obtained title thereto by deed, in 1837, from his brother Frederick Hager, and that the plaintiff "thereupon succeeded to the actual possession, occupation and fee thereof, and has ever since continued and still does continue in the actual possession thereof, and does possess and own the same in fee." The complaint proceeds to allege that the defendant unjustly claims title to 17 acres, 2 roods and 28 rods thereof, and caused a written notice and claim of title to be served on the plaintiff, (a copy of which is annexed to the complaint;) and further alleges that the plaintiff has been in the *uninterrupted actual possession* of said premises, *claiming title adversely*, for more than 20 years; and demands judgment that the defendant and all persons claiming under him be for ever barred from all claims to any estate of inheritance or freehold to the said premises, with costs of suit, and for such other relief as shall be proper. The notice annexed is as follows: "Take notice, that the undersigned Daniel Hager claims title to the piece of land of 17 acres, 2 roods and 28 rods, described in the annexed map as upland, and demands the possession of the same, and hereby gives notice that for any interference therewith or the timber on the same, he will regard you as a trespasser. Yours, &c., Daniel Hager. Dated June 11th, 1859. To Adam H. Hager, Esq."

The defendant's answer admits the plaintiff's title to a portion of the land described in the complaint, but denies it as to the 17 acres, 2 roods and 28 perches, as to which the defendant alleges that he is "the owner in fee and in the actual possession." It also admits some of the conveyances under which the plaintiff claims, but denies that the description

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embraced the tract in question, and denies that the plaintiff has been in the uninterrupted actual possession of the same, claiming title adversely, for more than 20 years. It further alleges that this tract, with other land, was conveyed to the defendant and John J. Hager as tenants in common, and this tract released by John J. Hager to the defendant, and he claims title thereto as owner in fee. Wherefore the defendant demands judgment that the plaintiff and all persons claiming under him be for ever barred from all claim to any estate of inheritance or fee to said premises, and for general relief.

The plaintiff put in a reply, denying generally "each and every allegation in the answer contained, which sets up matters in avoidance of the allegations contained in the complaint therein. Wherefore the plaintiff demands judgment, as stated in the complaint."

The issue thus joined came on to be tried before Justice PECKHAM, at the Schoharie circuit, in November, 1860. The land is situated in the town of Blenheim, in the county of Schoharie. After the cause was opened to the jury, and before any evidence was taken, the defendant's counsel moved to nonsuit the plaintiff, on the grounds, 1. That the complaint does not state facts sufficient to constitute a cause of action. 2. That the statute referred to in the plaintiff's complaint does not give the plaintiff authority to prosecute as plaintiff, and that this action can only be prosecuted by the defendant. Each of which motions so made by the defendant were overruled by said judge. To which ruling and decision the counsel for the defendant excepted. This presents the first question for our decision.

It seems clear enough that the complaint cannot be sustained as an ordinary complaint in ejectment. But I think, upon the authority of the case of *Hammond v. Tillotson*, (18 Barb. 332,) it is a good complaint under the title of the revised statutes entitled "Proceedings to compel the determination of claims to real property in certain cases," as amend-

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ed by subsequent statutes, and modified as to the forms of proceeding, by the code. (2 *R. S.* 313. *Laws of 1848, ch. 50* ; 1855, *ch. 511. Code, § 449.*) It seems to have all the essential elements of, and to demand the relief required by, the *notice* specified in that title. In arriving at this conclusion I lay out of view, as surplusage, the notice appended to the complaint, served by Daniel Hager on Adam H. Hager. It in nowise complies either in form or substance with the notice mentioned in the aforesaid title, and cannot be sufficient to authorize Daniel Hager to become the actor in initiating proceedings under that title, nor to debar Adam H. Hager from resorting to proper proceedings under that title to compel the determination of claims to the property in question. I think, therefore, this motion for a nonsuit was properly denied.

I think the interrogatory put to the plaintiff, as to permission asked of him by Ells, an adjoining owner, to cut wood near the fence on the south side, was not improperly allowed. If such permission was sought, it was a *verbal act* characterising the extent of the claim of an adjoining owner, and the possessory claim and acts of ownership of the plaintiff. It is scarcely of importance enough, even if it were technically objectionable, to justify a new trial on that ground.

I have more doubt as to the question allowed to be put to the witness Kniskern, to show that the premises were assessed by him, as an assessor of the town, to the plaintiff. But as tending to show a claim thereto on the part of the plaintiff, somewhat open and notorious, and to give practical character to his assertion of title, I think it may be justified. If the question had been, has the plaintiff paid taxes upon these premises, it seems to me that fact would have been, however slight, admissible as some evidence of a claim and act of ownership. Title to lands not under actual cultivation or inclosure must be made out, to some extent, through the claims and exercise of practical acts of ownership, (that is, acts indicating ownership or supposed ownership,) on the part

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of the person asserting title. And the payment of taxes would, I think, be an act of this description. The question put is nearly identical. It was doubtless intended to be followed up by proof of the payment of the tax, in pursuance of the assessment, or what is more probable, the latter fact was regarded as practically included in the former; and as no specific objection was made raising the point of discrimination between the two, I think they may be regarded as meaning one and the same thing. Indeed, independent of this, I am not sure that the entry of this tract on the assessment roll to the plaintiff in this action, open to the inspection of the defendant and all other persons, by a public officer whose especial business it was to make such entries, and to make the necessary personal observation, and obtain the necessary official information to enable him to make such entries according to the truth, would not be a fact of open claim and recognized ownership or possession, which, however insignificant in real effect upon the question of title, would not be *admissible* evidence on that question, as a circumstance proper for the consideration of a jury. I think, on the whole, a new trial ought not to be granted on this account.

The remaining exceptions relate to the charge of the judge.

The judge is supposed to have erred in charging the jury that in the event they found that the plaintiff had no title to the premises, and for that reason found for the defendant, they might proceed one step further, and determine whether the defendant had title to the whole, or what portion thereof. I see no objection to such an instruction to the jury. In this peculiar proceeding the defendant occupies substantially the position of a plaintiff in the action of ejectment, and must recover on the strength of his own title, which, as to nature and territorial extent, must in the action of ejectment be particularly stated in the verdict; and I think it not improper to have it so stated in this form of proceeding, if indeed the statute does not peremptorily require it; for the verdict *must* specify whether the defendant is entitled to immediate pos-

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session, or only to an estate in reversion or remainder; and a writ of possession issues or does not issue accordingly. (2 R. S. 314, §§ 13 to 16, as amended by ch. 511 of Laws of 1855.) It can be no less proper, especially with a view to the form and effect of the ultimate judgment to be pronounced in the case, that the verdict should specify the *extent* of the defendant's title, whether covering the *whole*, or only a *part* of the premises; for if only the latter, then it would seem, in analogy to the practice in ejectment, the verdict must specify that the adverse party is entitled to the residue, or the judgment must declare that the defendant's recovery is to be limited to the portion thus ascertained to belong to him. There does not, therefore, seem to have been any error in this direction to the jury. Independent of this, however, the exception is wholly *unimportant*, as the jury never reached that stage of the case, having decided in favor of the plaintiff, and therefore having had no occasion to designate the nature or extent of the defendant's alleged title.

The next exception is also not well founded. The judge charged that the non-production of a deed (alleged to contain a material clause fraudulently inserted) in the defendant's possession, and *purposely suppressed* by him, and containing evidence bearing strongly on the question of fraudulent insertion, was a circumstance upon which the jury *might* pronounce against the defendant as to that clause. There was no error in this direction. It contained no positive direction, but submitted the matter to their determination, leaving them to decide upon the weight due to it.

Nor do I think the succeeding exception well taken. The judge charged that it was the duty of the clerk to record the memorandum of alterations and interlineations in a deed, and that the absence of any such memorandum in the *record* was a circumstance for their consideration, as to that clause and its fraudulent insertion. To which the defendant excepted. It is not apparent whether the defendant intended to except to the whole of this sentence, or only to the latter

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clause. It is the duty of the clerk to *record* the conveyance and the certificate of proof or acknowledgment. (1 R. S. 756, 760.) His duty, or the mode of performing it, is not more *particularly* defined. It is apparent, however, that every thing on the face of the deed or certificate which can be put upon record, and which is material to throw light upon its *bona fide* or *fraudulent* character, *ought* to be recorded; and it may therefore be said it is the *duty* of the clerk to make the record in that way. It may not be, and probably is not, indispensable that the *record* should contain on its face the same interlineations, alterations or erasures as the original paper; but it is highly proper, and I think the *duty* of the clerk, to record the memorandum of such interlineations, alterations and erasures, made or certified by the attesting witnesses. Otherwise the record does not with *strict truth* represent the original document, nor contain the *whole* of its contents. The existence of such a memorandum may aid materially in determining the authenticity of portions of the deed, and its absence on the record may produce a false impression as to the appearance and genuineness of the original document. And without exacting undue strictness, or undertaking to define in every respect how the directions of the statute shall be carried out, I think it is incumbent upon the clerk to enter upon the record every portion of the contents of the original paper, whether it consist of the names of the parties or witnesses, the reciting, granting or descriptive part of the instrument, or the memorandum or certificate explanatory of the changes and modifications made in the text of the paper itself. To require any thing less than this of the clerk, would be leaving more to his discretion, in the mode of making up the record, than I think the legislature ever contemplated, or the courts should sanction. If such be the true exposition of the statute, then the absence of any such note of alterations or interlineations was a *circumstance for the consideration* of the jury. It was proper to direct their attention to it, and to leave them to

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dispose of it as should be just ; to consider how it occurred ; why it was done ; by whose agency ; and in connection with the non-production of the original instrument, to determine what inferences should be drawn from it in regard to this clause and its fraudulent insertion. It seems, however, to me to be a perfect answer to all the foregoing exceptions to the charge, that they relate to a branch of the case, to wit, the defendant's title, which the jury had no occasion to consider. It was conceded that the plaintiff's title, if well founded, took precedence of that of the defendant, as it was prior in point of time ; and as the jury found in favor of the plaintiff's title, it would seem to be a matter of no importance whether the instructions of the judge on the other part of the case were correct or not.

The judge committed no error in *stating* to the jury that the partition deed between John J. and Daniel Hager had but little if any thing to do with the question whether the plaintiff had title to the premises. The plaintiff did not derive title under that deed, in whole or in part ; nor had the judge so charged or intimated, in his previous remarks to the jury. But the judge did not charge even in this unqualified form ; for he went on immediately afterward to say, (and this part also is embraced in the defendant's *same* exception,) " that the *main* question was whether the description in the deed to the plaintiff under the rules given to them, embraced the premises in controversy." This was the *main* question in the case between the parties ; for the judge had already told them that if this were not so, "*then* they would find for the defendant."

The remaining exception to the charge, to wit, " that he was unable to see that all the calls in the plaintiff's deed could be fulfilled practically, except by running or referring to the 14 acre lot," was untenable. The judge had a right, upon evidence strongly tending to such a conclusion, to intimate or express his opinion that the plaintiff's title was best supported, by a reasonable view of the testimony ; especially

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when he emphatically added, (and this also is embraced in the same exception,) leaving the whole matter to their determination, "that the evidence on that subject was all before them, and if they could find otherwise they were at liberty to do so." If this constitutes legal error, it would be difficult to discover a charge upon which a new trial could not be obtained.

This case also comes here on appeal from the order of Justice HOGEBROOM, denying a new trial, on the ground of alleged irregularities in the conduct of the jury. The defendant's papers upon the motion establish substantially the following facts: That the jury were out several hours, unable to agree; that dinner was, by the direction of the court, ordered for them; that they went to Murphy's hotel for that purpose; that while waiting for dinner, some of their number separated from the rest; that a number of persons at such time had an opportunity to converse, and did converse, in the hearing of the jury, about said action, but not, so far as known, in regard to the merits thereof; that after dining they mingled promiscuously with persons in the bar-room of the hotel, and subsequently returned to their room to deliberate upon their verdict, and thereafter rendered a verdict for the plaintiff; that during their separation some of the jurors conversed with other persons than the jury; that the *subject* of the suit was talked of in their presence by some of the bystanders, and, as one of the jurors in his affidavit *thinks*, a *map* was exhibited of the land in question, but no direct communication made to the deponent; that while deliberating in their room, the constable was in the room with the jury, and frequently conversed with the jurors upon other subjects than to ask them if they had agreed upon their verdict.

The plaintiff's affidavits in opposition tend to show that the irregularities, if any, were not in any degree committed or countenanced by the plaintiff, or any one on his behalf, and that he had no knowledge thereof; that the jurors had mostly agreed upon a verdict before their separation for din-

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ner; that the constable did not converse with them in regard to the action, or the merits thereof; that the officer in charge was with the jury most if not all of the time; that they were not, so far as the deponents know or believe, in any degree influenced by any outside conversation, and did not hear or know of the same, and did not know of the exhibition of any map to or in the presence of the jurors; and that they believed the verdict to be in accordance with the law and the evidence in the case.

From this statement of the contents of the affidavits, it will be seen that there is no direct evidence of any irregularity actually prejudicing the defendant, in the cause; nor of any communication actually made to or in the presence of the jurors touching the merits of the action; unless the exhibition of a map of the land in question can be so considered. This fact rests on the affidavit of *one* of the *jurors*, who *thinks*, but does not swear, in any more positive terms, that such map was exhibited. From these facts the defendant's counsel contends, 1. That manifest irregularities were committed, as for example, in the constable conversing with the jurors; in the jurors being allowed to separate and mingle promiscuously with the bystanders, after they received the final charge of the court; and in their being present at and in a situation to hear conversation relative to the subject matter of the suit, and to see a map of the premises in question. 2. That these irregularities were of a character to have had a possible or probable influence upon the verdict; and if so, that the verdict must be set aside for that cause. 3. That the affidavits of the jurors themselves were admissible evidence to support all of these allegations, and all others, except such as imported personal misconduct on their part.

I do not deem it necessary to discuss the question whether affidavits of jurors are admissible upon questions of this description, involving the action and conduct of others towards them; because I am of opinion that the defendant's affidavits fail to make a case making it in anywise probable that

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he was legally prejudiced. This court has gone so far as to say that a direct interference with the jury on the fact of the constable having them in charge, to induce them to agree upon a verdict in favor of the successful party, is not sufficient cause for setting aside their verdict. (*Baker v. Simmons*, 29 Barb. 198.) The case is equally strong as to any officious intermeddling of strangers or any other persons than the prevailing party. (*Id.* 200. See also *Taylor v. Everett*, 2 How. Pr. Rep. 23; *The People v. Carnal*, 1 Park. Cr. Rep. 256; *People v. Hartung*, 17 How. 85. *Hartung v. The People*, 4 Park. Cr. Rep. 330.)

The case is barren of any facts leading rationally to the conclusion that the defendant was prejudiced. Assume that the constable talked with them. It is affirmatively shown that it was not in regard to matters connected with this suit. Assume that they separated. It is every day's practice to allow them to do so, even in criminal cases. It may be by accident, by inadvertence, by necessity, even by design; but this of itself is no cause for disturbing the verdict. Assume that the *subject* of the suit was talked of in their presence by bystanders. What was said? That it was a lengthy suit; that it was an expensive litigation; that it was about land in Blenheim; that the land was valuable, or the reverse? Assume that a map was *exhibited*, which is by no means certain. To whom exhibited, by whom, in what way, and for what purpose? Was it accompanied with remarks or explanations, or was it merely held up and talked about (inaudibly to the jurors) by bystanders among themselves? What map was it? One that had been given in evidence on the trial, in the hands of a surveyor or other witness? All these are questions not answered by the evidence. To set aside a verdict without any further light upon these subjects than is presented by the affidavits, would seem to be trifling with the solemnity of a verdict rendered upon oath. If remarks were made tending to prejudice the cause or the parties, the nature of them could be stated; and the very

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omission to state what they were by the persons—whether jurors or otherwise—who heard them, furnishes pregnant proof that they were wholly immaterial and unprejudicial. While we should carefully guard the purity of verdicts in our courts of justice, and refuse to sustain them when tainted with any reasonable suspicion of abuse, merely idle or conjectural suggestions of prejudice or influence ought not to be listened to. From the very mode of administering justice in our courts, jurors are in almost every case necessarily more or less brought into contact with bystanders or strangers to the controversy, and we must be careful not to countenance merely fanciful or imaginary notions of prejudice to the parties, resulting therefrom.

The motion for a new trial upon exceptions should be *denied*; and the order refusing to set aside the verdict for irregularity should be *affirmed*, with \$10 costs.

[ALBANY GENERAL TERM, September 1, 1862. *Hogsboom, Peckham and Miller, Justices.*]

 JAY CADY and others, executors, &c. *vs.* GAYLOR SHELDON and others.

A guaranty of collection implies that a note or evidence of debt is good, or good and collectible against the principal debtors; and this means collectible by due course of law.

Ordinarily, to test that question, it is necessary that the customary legal proceedings should be resorted to, viz. a judgment and execution against the parties primarily liable to pay; and the return of an execution unsatisfied is *prima facie* sufficient and satisfactory evidence that it is not collectible.

Yet it is not absolutely *indispensable* that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings would be entirely ineffectual. Proof that the principal debtors, from the period of the maturity of the debt, have been uniformly insolvent and unable to pay any part of the debt, is satis-

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factory and sufficient evidence that legal proceedings would be unavailable to collect the note.

Legal proceedings are not absolutely a condition *precedent* to the liability of the guarantor; but equivalent evidence of the inability to collect any part of the debt will suffice.

In an action upon an instrument guarantying the collection of a bond, the referee having found, upon evidence warranting such a conclusion, that the principal debtors were severally insolvent and unable to pay any part of the bond; *Held* that after such a finding the court might well conclude that a suit against them would be utterly nugatory, and therefore unnecessary to be brought as a condition precedent to the liability of the guarantors.

When a mortgage is given, as collateral to the bond guarantied, it is not indispensable that the holders of the bond should seek satisfaction out of the mortgaged premises, by a foreclosure, if it appears that a resort to that remedy would have proved fruitless, in consequence of the sale of the mortgaged premises under a statute foreclosure, to satisfy a prior mortgage, at a price leaving no surplus.

Where a mortgagee assigns the mortgage, and the bond accompanying the same, to another, covenanting in the assignment that they shall be paid when due, a subsequent holder of the bond, to whom the same has been assigned, with a guaranty of payment, must first attempt the collection of the debt, from the obligee and mortgagee, before he can resort to the guarantors, upon their guaranty.

Such a covenant is an absolute *guaranty* of payment, entitling the assignee to prosecute the assignor thereon immediately after default in payment of the amount due upon the bond and mortgage; and the benefit thereof will pass to a subsequent assignee, under an assignment of the securities, executed by the covenantee.

ON and before the 25th of May, 1842, the defendants were partners, conducting mercantile business in Albany, under the name of G. & S. Sheldon & Co. On the 23d day of March, 1840, O. & L. Holcomb and A. H. Spencer made and executed to H. Farrington a bond and mortgage for \$2507.41, payable, the one half in four and the other in five years from date, with interest. On the 13th of October, 1841, Farrington assigned the bond and mortgage to Alexander Sheldon, for the consideration of \$2500; and Smith Sheldon, one of the defendants, was a witness to the assignment. In the assignment Farrington covenanted with Alexander Sheldon that the money secured by the bond and mortgage would be

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paid at the time the several payments became due. On the 25th of May, 1842, Alexander Sheldon, for the expressed consideration of \$2500, paid by Samuel Jackson, assigned the bond and mortgage to him; and on the same day, the defendants, by a guaranty indorsed on the back of the bond, bearing the same date as the assignment, guarantied the collection of the bond. The guaranty was in these words: "For and in consideration of \$2500, to us in hand paid by Samuel Jackson, the receipt whereof is hereby acknowledged, we guarantee the collection of said bond. Dated at Albany, May 25, 1842. G. & S. Sheldon & Co." On the bond was indorsed by G. & S. Sheldon & Co., in their firm name, a receipt dated May 2, 1842, for interest, up to March 23, 1842, by note to them. The defendants, also, and after the assignment to Samuel Jackson, received and indorsed on the bond, in June, 1843, \$175.51, for interest due on the bond and mortgage. The mortgaged premises, which were situated in Carthage, Jefferson county, were sold upon the foreclosure of a prior mortgage, and the proceeds of sale were \$600 or \$700 less than the amount due on such mortgage. The obligors in the bond to Farrington, as the referee expressly found, were severally insolvent and unable to pay any part of the bond—L. Holcomb and Spencer from and after March, 1844, and O. Holcomb from and after January, 1845. Samuel Jackson died on the 12th of April, 1845, after having made his will, wherein he appointed the plaintiffs his executors and executrix, &c., and letters testamentary were granted to the plaintiffs. The plaintiffs, on a complaint stating most of the foregoing facts, demanded judgment against the defendants for the said sum of \$2507.41, with interest from the 23d day of March, 1844, besides costs. The referee dismissed the complaint, and nonsuited the plaintiffs. Judgment having been perfected, in favor of the defendants, on the report of the referee, the plaintiffs appealed therefrom to the general term.

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A. C. Paige, for the appellants.

J. H. Reynolds, for the respondents.

By the Court, HOGEBROOM, J. The first question to be determined is the nature and obligation of the guaranty. The defendants "guaranteed the collection" of the bond. It is therefore a guaranty that the bond is collectible; that is, capable of being collected of the parties liable or bound to pay it. A guaranty of the collection of a note is a guaranty that it is collectible *by due course of law*. (*Cumpston v. McNair*, 1 *Wend.* 457.) It obliges the party to whom the guaranty is given, to prosecute all the parties with due legal diligence before he can resort to the guarantor. (*Moakley v. Riggs*, 19 *John.* 69. *Thomas v. Woods*, 4 *Cowen*, 173. *Loveland v. Sheppard*, 2 *Hill*, 139. *Burt v. Horner*, 5 *Barb.* 501.) In the latter case it is said that the legal effect of such a guaranty is, that the guarantee (the party receiving the guaranty) would, within a reasonable time and with due diligence, institute against the principal debtors legal proceedings for the collection of the paper, and prosecute them without delay to consummation; that this was a condition precedent to the liability of the defendants, and imposed the duty of diligence not only in the *manner* of the prosecution but also in its *institution*.

In *Thomas v. Wood*, Justice Woodworth says, "whatever may be the effect of letting a term pass, there is *no doubt* that seventeen months' delay would discharge from the guaranty." In *Burt v. Horner* it is said, "the question is not whether the defendants have been injured by the delay; but whether the plaintiff has performed his contract—the condition precedent to his right to call upon them. A compliance on his part with the terms of the guaranty is indispensable." (5 *Barb.* 506.) It was further held in that case that the mode of ascertaining whether the debtor has property to satisfy the debt, within reach of the process of the court, is to

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issue such process to test the question, (p. 507;) and that it does not lie with the plaintiff to say that this would be "a mere idle ceremony."

In *Vanderveer v. Wright*, (6 Barb. 547,) it was held that "a guaranty that a demand is collectible is clearly a conditional promise, binding upon the guarantor only in case of diligence. (*Loveland v. Sheppard*, 2 Hill, 139. *Curtis v. Smallman*, 14 Wend. 231. *Moakley v. Riggs*, 19 John. 69.)" "Nor is it like a guaranty of payment which, like that of an indorsement, is similar to a new note, but is purely a conditional promise, becoming absolute on the performance of the condition precedent. (*White v. Case*, 13 Wend. 543.)" (6 Barb. 550.) In a dissenting opinion, (not on the main question,) Judge Willard lays down the rule as follows, (*Id.* 552:) "The obligation of the defendant upon his guaranty was, in legal effect, that he would pay the note, provided it could not be collected of the maker, after using due diligence, by process of law, to collect it of him. In general, a party who suffers a term to elapse without prosecuting the maker is guilty of laches, and loses his remedy against the guarantor. (*Moakley v. Riggs*, 19 John. 69. *Kies v. Tift*, 1 Cowen, 98. *White v. Case*, 13 Wend. 543. *Eddy v. Stanton*, 21 id. 255. 5 id. 307. *Loveland v. Sheppard*, 2 Hill, 139. *Cumpston v. McNair*, 1 Wend. 457. *Curtis v. Smallman*, 14 id. 231. *Thomas v. Woods*, 4 Cowen, 173. *The People v. Jansen*, 7 John. 332.) The remedy however against the guarantor will not be impaired, if the debtor was insolvent and so continued, after the guaranty, and up to the commencement of the suit, nor if the delay in prosecuting the principal debtor is at the instance of the guarantor. In the first case, the guarantor suffers no loss by the delay; and in the second, he cannot be permitted to turn an indulgence granted at his own solicitation into a weapon of defense. (*Thomas v. Woods*, 4 Cowen, 173.)"

In *Hart v. Hudson*, (6 Duer, 303,) Judge Duer of the superior court of New York lays down the rule in this lan-

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guage: "A guaranty of the collection of a promissory note, or other evidence of a debt, does not mean that it shall be paid at its maturity, but that by a prompt and diligent use of the means which the law affords, its payment may be enforced. Hence, if the debt so guarantied is unpaid at its maturity, the creditor, if he wishes to retain the liability of the guarantor, must without delay commence proceedings for its recovery, and it is only when he can show that all the remedies which the law gave him against the debtor had been exhausted, that he is in a condition to demand payment of the debt from the guarantor. If he delay without necessity to commence the necessary proceedings, or, when an action has been commenced, to prosecute it to judgment and execution, the delay is imputed to him as laches, and the guarantor is discharged. (*Taylor v. Bullen*, 6 Cowen, 624. *Cumpston v. McNair*, 1 Wend. 455. *Eddy v. Stanton*, 21 id. 255. *Moakley v. Riggs*, 19 John. 69. *Loveland v. Shepard*, 2 Hill, 159. *Burt v. Horner*, 5 Barb. 501.)"

In *Gallagher v. White*, (31 Barb. 94,) Judge Brown uses this language in regard to a guaranty of collection: "Assuming the force and validity of White's guaranty, for the present, his promise and obligation was that the note could be collected from the maker if Taylor would, within a reasonable time and with due diligence, prosecute the same to judgment and execution against the maker. This obligation to prosecute within a reasonable time and with due diligence was a condition precedent to the liability of the maker, (citing several cases.) There is a very material distinction between the omission to prosecute the principal debtor *altogether*, and the omission to prosecute within a *reasonable time* and with due diligence. A reasonable time is not a *definite* time, and must always depend upon the particular circumstances of the case presented, because if the principal debtor was hopelessly insolvent at the time of the making of the guaranty, and so continued, the guarantor could not be

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prejudiced by an omission to prosecute within two months, or ten months, or any other given period."

In the case of *Morris v. Wadsworth*, (11 *Wend.* 100; *S. C.*, 17 *id.* 103,) it was held that unless the very terms of the guaranty imply that the liability of the guarantor depends upon the failure to obtain payment of the principal by proceedings at law, such proceedings are not a condition precedent; and that a guaranty to pay, if recompense cannot be obtained from it, does not require a suit against it, if he is insolvent.

In *Merritt v. Lincoln*, (21 *Barb.* 249,) it was held that a surety will not be discharged by the neglect of the creditor to collect the debt of the principal, on being requested by the surety to do so, unless it appears that the principal was at the time of the request solvent and able to pay his debts, and that a creditor is not bound to pursue an insolvent principal at the direction of the surety. Judge Welles says, at p. 251, "If there was an inability on the part of the principal to pay his debts, it is not perceived how a prosecution would result in collecting the debt in question, unless some advantage or preference over other creditors would be thereby obtained, which the law does not favor, and which the court will not encourage."

In *Newell v. Fowler*, (23 *Barb.* 632,) the same judge (Welles) delivering the opinion of the court, in speaking of a guaranty of collection of a bond and mortgage, says: "It was a condition precedent to any liability of the guarantor that the other party to the contract of guaranty should, within a reasonable time, institute legal proceedings upon the securities assigned, and prosecute them with diligence to a consummation. It is not pretended that any thing of this kind has ever been done. Nothing will excuse the party holding the guaranty from the performance of this condition but the act of the guarantor himself. It was a part of the contract, and it will not answer for the party to say it would have been of no use to prosecute. Conditions precedent

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must be strictly performed." After speaking of the evidence of a waiver, and saying that it related entirely to the *mortgage*, the judge adds, (p. 623 :) "It does not appear that the testator waived proceedings against Kent, or his estate, on the bond. That was as much a part of the condition as was the proceeding to foreclose the mortgage. It no where appears when Kent died, or when he became insolvent, *if that were material*. It is sufficient that the contract imposed upon Starke and his assignees the burthen of exhausting by legal proceedings every remedy which the bond and mortgage gave them, before the guarantor's liability should become fixed."

In *Eddy v. Stanton*, (21 *Wend.* 255,) the plaintiffs declared on an agreement made by the defendants cotemporaneous with the transfer by the defendants to the plaintiffs of a note against one Simmons, that in case the plaintiffs could not set off such note in payment of any balance due from them to Simmons, or collect the same in some other way or due course of law, they would repay the plaintiffs the amount of the note with interest and the costs of any prosecution to collect or set off the note. They averred an inability to *set off* the note (not by suit) in payment of any balance due Simmons, and that Simmons was *insolvent* at all times from and after the transfer of the note, and therefore that a suit to collect the same would have been unavailable. In a second count it was averred that thirty-one months after the transfer the defendants *released* the plaintiffs from any obligation to sue the note, and *refused* to pay the costs of prosecution. The court held, on demurrer to the declaration, (p. 258,) that "the *insolvency* of Simmons was no excuse, (*Moakley v. Riggs*, 19 *John.* 91, 2;) especially in a case like this, of *set-off*, and wherein the defendants had agreed to bear the expense. (*Thomas v. Woods*, 4 *Cowen*, 173. *Taylor v. Bullen*, 6 *id.* 624.)" The court further held that as to the release and refusal to bear the costs of prosecution, it was *too late*, having occurred thirty-one months after the

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transfer, and therefore after the plaintiffs had been guilty of *laches* in prosecuting the note.

From this examination of some of the leading authorities, I think the following conclusions are deducible, and supported by the weight of authority.

1. That a guaranty of collection implies that a note or other evidence of debt is good or good and collectible against the principal debtors ; and this means collectible by due course of law.

2. That, ordinarily to test that question, it is necessary that the ordinary legal proceedings should be resorted to, to wit, a judgment and execution against the parties primarily liable to pay ; and that a return of an execution unsatisfied is *prima facie* sufficient and satisfactory evidence that it is not collectible.

3. That it is not absolutely *indispensable* that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings would be entirely ineffectual ; and that proof that the principal debtors from the period of the maturity of the debt have been uniformly insolvent and unable to pay any part of the debt, is satisfactory and sufficient evidence that legal proceedings would be unavailable to collect the debt.

4. That legal proceedings are not, under the authorities, absolutely a condition *precedent* to the liability of the guarantor, but equivalent evidence of the inability to collect any part of the debt will suffice. And that however desirable it may be (as I think it is) to have one uniform rule, to wit, the return of an execution unsatisfied against the principal debtor as the test of the collectibility of a debt, the weight of authority does not as yet allow us to take that position and hold it as the irreversible rule and test, without any exception whatever.

Applying these principles to the present case, we find that the referee has expressly found, on evidence warranting such

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a conclusion, that the principal debtors were severally insolvent and unable to pay *any* part of said bond. After such a finding we may well conclude that a suit against them would have been utterly *nugatory*, and therefore unnecessary to be brought as a condition precedent to the liability of the defendants.

So, also, I think it was not indispensable to foreclose the mortgage which was the collateral to the bond. The bond and mortgage became due, one half thereof in March, 1844, and the remainder in March, 1845. In January, 1846, (of course on proceedings previously instituted,) the mortgaged premises were sold under a statute foreclosure to satisfy a prior mortgage, and were sold and struck off to a purchaser for a sum between \$600 and \$700, which left no surplus. The amount of the prior mortgage does not appear; but of course it exceeded this amount. If regularly foreclosed, as we must assume to have been the case, the subsequent mortgagees would have had notice of the proceedings. But whether so or not, we cannot presume that the sale was not fairly conducted, or that the premises did not bring an adequate price; nor was the sale at such a distance of time from the maturity of the bond, that we can suppose the property (real estate) to have materially depreciated in value. I am of opinion, therefore, that if the guaranty of the collectibility of the *bond* would require the holders of the security *prima facie* to seek satisfaction of the debt out of the mortgaged premises, they stood excused for not resorting to this remedy, by satisfactory evidence that it would have proved of no utility whatever.

We are obliged therefore to go one step further, and determine whether as a prerequisite to the defendants' liability upon the guaranty, the plaintiffs were obliged to attempt the collection of the debt out of the obligee and mortgagee, Farrington, who had covenanted on the assignment of the bond and mortgage that they should be paid when due. If this was necessary, then the plaintiffs have failed to make out a

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cause of action, because they have not prosecuted Farrington. To determine this question, we must inquire whether this covenant was transferred or enured to the benefit of the plaintiffs; and if so, whether it was one of those means for determining the collectibility of the bond debt, which must be resorted to before the liability of the defendants would attach upon the guaranty.

O. & L. Holcomb and Spencer executed the bond in question to Farrington. The mortgage of O. Holcomb was collateral to it and doubtless accompanied it—so we must presume—into the hands of the subsequent holders. It bore the same date as the mortgage, was executed by one of the obligors to the obligee in the bond, secured the same sum, and expressly referred on its face to the bond as a collateral security.

By an assignment bearing date the 15th day of October, 1841, Farrington assigned the bond and mortgage to Alexander Sheldon. In that assignment is contained the following covenant: "And I do hereby promise, covenant and agree, to and with the *party of the second part*, (Sheldon,) that there is now secured to be paid by the said bond and mortgage the sum of twenty-five hundred and seven dollars and forty-one cents, with interest from the 23d March, 1841, and that the same will be paid at the time the several payments become due by such bond and mortgage."

This is undoubtedly an absolute guaranty of payment, and would have entitled Sheldon to prosecute Farrington thereon, immediately after default in the payment of the amount due on the bond and mortgage. (*Allen v. Rightmere*, 20 John. 365. *Mann v. Eckford*, 15 Wend. 502. *Kemble v. Wal-lis*, 10 id. 374.)

Who Alexander Sheldon was, or what was his connection with the defendants, the proof does not disclose, and we can only infer from the allegations in the pleadings, and from the fact that Smith Sheldon, one of the defendants, was a subscribing witness to the assignment, and from some other facts

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to be presently alluded to. About seven months thereafter, and on the 25th day of May, 1842, Alexander Sheldon, by an instrument in writing under his hand and seal, assigned the bond and mortgage to Samuel Jackson, the testator of the plaintiffs. Contemporaneously therewith the guaranty in question was executed by the defendants, bearing the same date as the last assignment, (25th May, 1842,) and indorsed upon the *back* of the bond. On its *face* it is only a guaranty of the collection of the bond; the words being, "For and in consideration of \$2500 to us in hand paid by Samuel Jackson, the receipt whereof is hereby acknowledged, *we guarantee the collection of the said bond.*"

That Alexander Sheldon had some connection with the defendants, and that the defendants either had the benefit of, or were in some way interested in, the proceeds of the last mentioned assignment, is fairly presumable from the following facts: 1. The execution of the assignment and of the guaranty were simultaneous—at least they bear the same date—and the guaranty is indorsed upon the back of the bond, which is presumed to have been delivered simultaneously with the assignment, to the assignee. 2. The consideration (\$2500) is the same in both; and the guaranty expressly acknowledges this sum to have been paid by Jackson to the *defendants*, as the assignment acknowledges it to have been paid to *Alexander Sheldon*. That *two* sums of this amount were paid is not pretended, and is in the highest degree improbable. 3. On the bond (and on the mortgage) is indorsed under date of May, 1852, a receipt of the *defendants* of the interest (\$175.51) up to March 23, 1842. The interest of the previous year is receipted thereon by Farrington. Alexander Sheldon would appear to have been, therefore, only the *nominal* holder, as he received no part of the interest, but the *defendants* (to whom the bond and mortgage were never in terms assigned) received the whole interest during the period that Alexander Sheldon had the nominal title thereto. 4. It is also remarkable (though not particularly connected with

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the present question) that both the bond and mortgage contain an indorsement under date of *June*, 1843, of one year's interest (\$175.51) up to March 23, 1843; when the assignment would indicate that the bond and mortgage had been assigned to Jackson on the 25th of *May*, 1842.

These facts were, I think, sufficient to show, or to induce the referee to infer, that the defendants (and not Alexander Sheldon) were the real owners of the bond and mortgage at the time of the assignment to Jackson; and therefore that they are not to be treated in regard to the *guaranty* as mere *strangers* to the transaction, or mere *sureties* for Alexander Sheldon.

What, under such circumstances, was the effect of the covenant or guaranty of payment made by Farrington? Undoubtedly the covenant of Farrington was one of which Alexander Sheldon, the covenantee, might avail himself; it was at all events made for *his* benefit. Assuming that he was the real owner of the bond and mortgage, by the assignment, and that he regarded the covenant as one of value, is there much doubt but that he designed in the assignment to Jackson to transfer the benefit thereof and the remedy thereon to him. He transfers the bond and mortgage, and must, I think, be regarded as intending to transfer all the incidents and collaterals thereto, like the covenant in question. He authorizes the assignee to take all lawful ways and means for the recovery of the said sum of money, and among others, I think, the remedy on the covenant. There was no object in retaining it; for by so doing it would become extinct. And it may have entered as an important element in the consideration which Jackson paid. It is true that previous to the code it would have to be sued in Sheldon's own name, but only for the benefit of Jackson. But that objection no longer exists; as every suit must now be brought in the name of the real party in interest. (*Code*, § 111.) And I do not see why a covenant of this description, giving additional value to the bond and mortgage and connected with it, should not

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be regarded, in the absence of evidence to the contrary, as passing with it. (See *Ketchell v. Burns*, 24 *Wend.* 456; *McLaren v. Watson's Ex'rs*, 26 *id.* 425; *S. C.*, 19 *id.* 557; *Cooper v. Dedrick*, 22 *Barb.* 516.) In the latter case the court say, (p. 518,) "In my opinion when a guaranty is written upon a note and the note is transferred, nothing being said touching the guaranty, the contract of guaranty passes with the note. In other words, the sale and delivery of the note with the guaranty upon it furnishes prima facie evidence of a sale of the contract of guaranty. In the present case the defendant was one of the payees of the note, and the note was also payable to bearer. He transferred the note and guarantied the payment. In my opinion, any one who should become the holder of the note could maintain an action upon the guaranty, unless it should be shown that the contract of guaranty was not transferred at the time the note was transferred." (See also *Gallagher v. White*, 31 *Barb.* 96, 97.) I do not think *Thompson v. Rose* (8 *Cowen*, 266) is in conflict with these views, but rather in support of them.

The remaining question is whether if this covenant or guaranty on the part of Farrington passed, as an incident to the debt, to the plaintiff's testator, the remedy upon it must be pursued as well as upon the bond itself, before the liability of the defendants would attach. And I am of opinion, on the whole, that it would. The evidence is not decisive, but it is to be presumed, I think, that Jackson *knew* of this covenant. It was not *attached* to or indorsed upon the bond. But it was as a part of the assignment, one of the links in the chain of evidence essential to establish the testator's title to the bond; and it was produced, among the other papers, by the plaintiffs, at the trial. It was therefore one of the known and accessible remedies for the collection of the debt, and when it was transferred along with the other remedies, to Jackson by the *defendants*, (and the nominal holder, Alexander Sheldon,) it must be presumed that they designed the assignee should resort to it as one of the available reme-

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dies for the collection of the debt, before they were to be made liable upon their guaranty. In the case of a guaranty of a note, it is indispensable that the remedy should be pursued against the *indorsers* as well as the *makers* of the note, before the guarantor can be held responsible, and I do not see why the same rule should not apply as to other sureties or previous guarantors of the debt. (*Moakley v. Riggs*, 19 *John*. 69. *Thomas v. Woods*, 4 *Cowen*, 173. *Kies v. Tift*, 1 *Cowen*, 98. *Burt v. Horner*, 5 *Barb*. 501. *Loveland v. Shepard*, 2 *Hill*, 139.)

I am therefore of opinion that it was incumbent upon the plaintiffs or their testator to pursue their remedy against Farrington, before prosecuting the defendants, and that for their neglect to do so the decision of the referee was right, and that the judgment entered upon his report should be *affirmed*.

[ALBANY GENERAL TERM, September 1, 1862. *Hogsboom, Peckham and Miller*, Justices.]

SALLY A. HOTCHKINS vs. WILLIAM HODGE.

In an action by a female to recover damages for a breach of a contract to marry, the judge allowed the plaintiff, after she had testified, without objection, to the defendant's promise that she should not be any the worse for him, nor come to any disgrace by him, and if she did he would marry her, to testify that she was pregnant by the defendant, at the time he abandoned her. *Held* that the evidence was properly received.

A wrong done to the female, such as sexual intercourse with her, by her alleged suitor, will not make a promise to marry, founded thereon or arising therefrom, invalid or inoperative. Such a promise is not liable to the objection that it encourages immorality.

It is too late, after the frequent adjudications in our own state and elsewhere, to consider the question whether long bestowed and particular attentions, having apparently an honorable object, furnish sufficient evidence from which the jury may *imply* a promise of marriage.

It is not indispensable that a promise to marry should be *express*. It may be

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implied from circumstances; and it may rest partly on both; that is, on express words, and on conduct and acts reasonably leading to the same conclusion.

When a case comes before the court upon *exceptions* ordered to be heard in the first instance at the general term, no question of *fact* can be discussed; nor the point that the decision of the jury is against the weight of evidence. A defendant requested the court to charge in a particular manner. This was refused, on the ground that the previous charge covered the whole ground occupied by the evidence. To this refusal the party excepted, but without excepting or objecting to the remark of the judge that the matter had been already charged upon, and without asking that the question of fact whether such charge had been made covering the whole case embraced by the evidence, should be submitted to the jury. *Held* that the proper exception not having been taken, the defendant was remediless.

MOTION for a new trial upon exceptions. The action was brought to recover damages for an alleged breach of a contract to marry. The defense was a general denial. The cause was tried before Justice GOULD, at the Sullivan circuit, on the 19th day of September, 1861. Evidence was introduced on the part of the plaintiff, tending to show considerable intimacy between the parties, and particular attentions, at intervals of two or three weeks, for a considerable period of time. The plaintiff also testified (without objection) that the defendant said, "I (plaintiff) should not be any the worse for him; that I should not come to any disgrace by him, and if I did he would marry me; he said I need not borrow any trouble; I should be none the worse for him; he would protect me. He never said a great deal about loving or being attached to me; he gave no reason for not marrying me. He said he did not want a wife then—he had no place to put her." The counsel for the plaintiff then put the following question to her, as a witness: "What was your condition at the time he abandoned you, resulting from your intimacy with the plaintiff?" (defendant.) The defendant objected to the question, on the following grounds: 1st. It is immaterial and irrelevant. 2d. It is illegal and improper to show that the plaintiff was pregnant with child by the defendant; that being no legitimate ground for en-

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hancing the damages in this case. The court overruled the objection and permitted the witness to answer, on the ground that it was part of the *res gestæ*, and a circumstance tending to show the defendant's meaning, and also as giving binding effect to his conditional promise. The defendant excepted to this decision. The witness answered, "I was pregnant with the defendant." Further evidence was given on the part of the plaintiff, tending to show an implied and an express promise by the defendant to marry the plaintiff, and a breach thereof. The plaintiff having rested, the defendant moved for a nonsuit upon the following grounds: 1. The evidence fails to show a valid contract to marry, between the parties. 2. The evidence shows that no valid contract to marry was made between the parties to this action. The court denied the motion, and the defendant excepted. The defendant having given evidence tending to rebut the evidence given by the plaintiff, the court charged the jury as follows: 1. That an agreement to marry may be partly in words expressed, and partly supplied by circumstances. To which the defendant excepted. 2. That the promise to marry might be good and valid, and depend partly on words and partly on acts from which it might be inferred. To which the defendant excepted. 3. That if the jury found that the defendant, after the fault committed, and in view of the danger already incurred from his visits, promised her, if such exposure did occur, and she was brought to shame by their previous acts, that he would marry her, such contract was one the law would enforce. To which the defendant excepted. 4. The defendant asked the court to charge that a promise by the defendant to marry, in the event the plaintiff should be disgraced by the defendant, is void. The court refused, on the ground that the previous charge covered all that the evidence called for, on that point. The defendant excepted to such refusal. 5. The defendant asked the court to charge that to constitute a valid contract to marry, in the future, the contract must be express. The court refused, and

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the defendant excepted to the refusal. 6. The defendant asked the court to charge that to constitute a valid contract of marriage, each of the parties should expressly obligate themselves to the other to marry. The court refused, and the defendant excepted to the refusal.

The jury rendered a verdict for the plaintiff, of \$400.

A. C. Niven, for the plaintiff.

A. J. Bush, for the defendant.

By the Court, HOGEBOM, J. The circuit judge allowed the plaintiff to testify that she was pregnant by the defendant at the time he abandoned her. This evidence was objected to as immaterial and irrelevant, and also as illegal and improper, for the reason that pregnancy furnished no legitimate reason for enhancing the damages. I think the evidence was properly received. The plaintiff had already testified, without objection, to the defendant's promise that she should not be any the worse for him, nor come to any disgrace by him, and if she did he would marry her. To give effect to this promise, (assuming, for the present, its legal validity,) it was necessary, or at all events proper, that she should be permitted to prove that she had come, or was about to come, to disgrace or shame; and this was *one* mode of proving it. I think it was also proper as tending to give point and meaning to the defendant's declaration or promise that she should not come to any disgrace by him. The objections are scarcely specific enough to cover the point that a promise thus made had no legal validity; but if they were thus specific, I am of opinion that a promise of marriage, made *after* seduction has been effected, and *in consequence thereof*, is not thereby rendered *invalid*. It is not liable to the objection that it encourages immorality; because the wrong has been *already* perpetrated. And I am not aware that *any* wrong or injustice actually done to a female, which

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it is the duty of the wrongdoer to repair to the extent of his ability, furnishes any legal or sufficient reason for refusing to give effect to a promise of marriage, which, under the circumstances, is the best and most honorable reparation the offender can make for his misconduct. The testimony is susceptible of the construction that the promise was made after the immoral indulgence had taken place; and perhaps that is the most natural and reasonable interpretation to be put upon the testimony. It therefore avoids the objection that it tends to encourage vice and immorality. On the contrary, it leads to the conclusion that the seducer was thus willing to make his victim the only recompense which the circumstances admitted, tardy and imperfect though it might be.

The motion for a nonsuit was properly denied. It is too late, after the frequent adjudications in our own state and elsewhere, to consider the question whether long bestowed and particular attentions having apparently an honorable object, furnish sufficient evidence from which the jury may *imply* a promise of marriage. (*Southard v. Rexford*, 6 Cowen, 254. *Wells v. Padgett*, 8 Barb. 323. *Hubbard v. Bonesteel*, 16 id. 360. *Willard v. Stone*, 7 Cowen, 22. *Hutton v. Munsell*, 3 Salk. 16. 1 *Parsons on Cont.* 545.) But there was also evidence sufficient for the consideration of the jury of an *express* promise. And the *breach* of the promise, if made, was abundantly proved.

The only remaining questions arise upon the charge of the court, and its refusal to charge; for as this case comes up here upon *exceptions*, ordered to be heard in the first instance at the general term, no question of *fact* can be discussed, nor the decision of the jury as being against the weight of evidence. (*Code*, § 265. *Fry v. Bennett*, 16 How. 385. *Morange v. Morris*, 20 id. 257. *Taylor v. Harlow*, 11 id. 285.)

As to the exceptions taken to the first and second clauses of the charge, and the second and third refusals to charge, they are disposed of by the remarks already made. It is far from being *indispensable* that the promise to marry should

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be *express*, in order to be valid. It is equally clear that it may be *implied* from circumstances. I see no reason to doubt that it may rest partly on both; that is, on *express* words and on *conduct and acts* reasonably leading to the same conclusion. It is to be gathered from the whole conduct and conversation of the parties; and to limit it to what took place at one particular time, and to one particular class of evidence, would be doing violence to the intentions of the parties, and to the known and accustomed course of proceeding in like cases. These four exceptions must therefore fail.

The third exception to the charge is also unavailable. Its proper disposition is controlled by what has been already said in disposing of the exception to evidence. A wrong done to the female, such as sexual intercourse with her, by her alleged suitor, cannot make a promise to marry, founded thereon or arising therefrom, invalid and inoperative. The *motive* for the promise is a *laudable* one, being founded on a willingness to repair an acknowledged wrong. It is not, in a just and legal sense, the *consideration* for the promise; for the proposition assumes that the wrong was already done before the promise was made, and not in anticipation of, or with a view to it. Indeed, in a strict sense, the only sufficient *consideration* for a promise of marriage—at least an absolutely indispensable ingredient in it—is a reciprocal promise to marry, by the promisee to the promisor. If this clause of the charge is therefore to be understood, as I think it is, as simply enunciating the proposition that a promise to marry in the event that shame or exposure should occur from the consequences of sexual intercourse, is valid, provided such sexual intercourse has already occurred, anterior to the promise, and in anticipation of the results likely to flow from it, then I think the proposition is sound in point of law, and the charge correct.

The only remaining exception relates to the defendant's request to charge, "that a promise by a defendant to marry in the event that the plaintiff should be disgraced by the de-

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defendant, is void." This was refused, on the ground that the previous charge covered the whole ground occupied by the evidence. To this refusal the defendant excepted; but he did not except or object to the remark of the judge, that the matter in regard to which a charge was asked for, had been already charged upon, so far as it was covered by any evidence in the case. Nor did the defendant ask that this question of fact whether such charge had been in fact made, practically covering the whole case embraced by the evidence, should be submitted to the jury. And I think it may therefore well be said that the exception has not been taken, and the point is therefore untenable. (*Dows v. Rush*, 28 Barb. 179, 180, 181. *Bidwell v. Lament*, 17 How. Pr. Rep. 359, 360, 361.) I have already expressed the opinion that this view of the evidence, taken by the judge at the circuit, was not unwarranted by the case itself. The judge put himself solely on this ground; he did not refuse to charge that the defendant's proposition was correct in the abstract, but he charged that it was inapplicable to the case. As this last remark was in nowise impugned, nor any request made to submit the matter to the jury, the defendant is remediless.

The motion for a new trial should therefore be *denied*.

[ALBANY GENERAL TERM, September 1, 1862. *Hogsboom, Peckham and Miller*, Justices.]

HOWE vs. THE BUFFALO, NEW YORK AND ERIE RAIL ROAD COMPANY.

Where an agent is prosecuted, and a judgment obtained against him, for an act done in obedience to instructions from his principal, such act being done in good faith, and under the belief that the instructions were reasonable, and the act lawful, he is entitled to reimbursement from his principal, for all the damages he has sustained.

And it is immaterial whether the act for which the recovery was had against the agent was in fact lawful or unlawful; the instructions being, on either hypothesis, the proximate cause of the action and recovery.

The settlement of the judgment by the agent, after he has been charged in execution, by giving his note for the amount, is a good payment of the judgment.

If the agent is charged in execution upon the judgment recovered against him, this is the highest satisfaction known to the law, and is equivalent to an actual payment by him, in money, of the judgment, for the purpose of charging his principal with the liability for full reimbursement.

THE defendant was the proprietor of a rail road from Buffalo to Corning, connecting at the latter place with the New York and Erie road, and at Avon with the Rochester and Genesee Valley road. The plaintiff was a conductor, in the employ of the defendant; his instructions being not to honor such passenger tickets, issued by the New York and Erie Rail Road Company, as on their face were marked "good for six days only, from date," if presented after the limited time, but to demand fare, and if the passenger refused to pay, to stop the train and remove him from the cars. On the 21st of January, 1858, one Hotchkin, a passenger on the plaintiff's train, offered such a ticket, more than six days old, and refused to pay fare, and the plaintiff stopped the train and put him off. For this Hotchkin sued the plaintiff, recovered a judgment against him and put him on the jail limits of Steuben county, on an execution issued against the person. While the plaintiff was so in custody, Hotchkin assigned the judgment against the plaintiff to David Rumsey, who took the plaintiff's note on time for the amount of the judgment, and receipted the judgment in full; whereupon the plaintiff was discharged from custody. This action

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was then commenced, the plaintiff claiming to recover of the defendant the amount of the Hotchkin judgment, upon what was claimed to be an implied contract of indemnity. It was proved, upon the trial, that the plaintiff had not paid the note which he gave to Rumsey, and that the Hotchkin judgment remained undischarged of record. There was no claim in the complaint, and none was made upon the trial, to recover any damages for the imprisonment; and there was no proof that the plaintiff had ever suffered any pecuniary damage, unless the giving of his note was such. The action brought by Hotchkin was for assault and battery, and the referee in that action found as a fact that in putting Hotchkin off the train, the present plaintiff committed an assault and battery upon Hotchkin. The present action was tried by the court, at the Steuben circuit, and resulted in a verdict for the plaintiff for the amount of the Hotchkin judgment, and interest as damages, and from the judgment thereon the defendant appealed.

F. E. Cornwell, for the appellant.

D. Rumsey, for the respondent.

By the Court, WELLES, J. It is stated by Judge *Story* in his treatise on *Agency*, (§ 339,) as a general principle of law, "that an agent who commits a trespass, or other wrong to the property of a third person, by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts *bona fide*, will be entitled to reimbursement and contribution from his principal for all the damages which he sustains thereby;" and that "the same doctrine applies to all cases of losses or damages sustained by an agent in the course of the business of his agency, if they are incurred without any negligence or default on his own part." And again, in section 340, the learned author remarks: "Here again the common law only

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follows out the beneficent principles of the civil law ; for, as, on the one hand, the agent is not permitted to reap any of the profits of his agency properly belonging to his principal ; so, on the other hand, he is held entitled to be indemnified against all losses which have been innocently sustained by him upon the same account ; but not for losses sustained by his own default or negligence." These are sound propositions, and are well sustained by the authorities referred to in support of them. It seems to me they are applicable to the case under consideration. The plaintiff was prosecuted and a judgment obtained against him for an act done in obedience to instructions from the defendant, his principal, which was done in good faith, and under the belief that the instructions were reasonable and the act lawful. That being so, it is immaterial to the present question whether the act for which the recovery was had against him was, in fact, lawful or unlawful. The instructions were the proximate cause of the act for which he has been adjudged liable ; and that determines the liability of his principal to indemnify him. The defendant had due notice of the action brought by Hotchkin against the plaintiff, and through its agents employed attorneys and counsel to defend it. Its president and vice president were present at the trial of the action brought by Hotchkin against the plaintiff, and were sworn as witnesses. The defendant in effect assumed the burthen of the defense in that action, as I think it was in law and in good faith bound to do. It was in reality its own case. Its agent had been prosecuted for obeying its instructions in good faith ; and the defendant, and not he, was bound to abide the consequences. Hotchkin recovered in the action, and, as before remarked, it is of no consequence, as between the present parties, whether the recovery was lawful or unlawful. On either hypothesis the instructions given by the present defendant to the present plaintiff were equally the proximate cause of the action and recovery.

It is claimed by the counsel for the defendant that there is

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no implied obligation on the part of a principal to indemnify his agent against the consequences of obedience of a lawful command. I do not, however, so understand the law. If the act done is in the regular course of the business or employment of the agency, it would be most unjust to subject the agent to the consequences of his obedience, when such consequences were the compulsory payment of damages; and quite as much so as in the case of innocent obedience to an unlawful order. In each case the agent acts in good faith, under the belief that the order is lawful. If the judgment in favor of Hotchkin was contrary to law, it was the business of the defendant in this suit, either to pay it up or have it reviewed and set right. The plaintiff owed no duty to this defendant to litigate further, at his own expense and risk.

I think, also, that the settlement of the judgment by the plaintiff, with Rumsey, who held an assignment of it, after the former had been charged in execution, by giving his negotiable promissory note for the amount, was a good payment of the judgment. Rumsey, on taking the note, gave a receipt in full for the judgment, and agreed to satisfy it of record. I incline also to the opinion that the fact that the plaintiff was charged in execution upon the Hotchkin judgment, was equivalent to an actual payment in money by the plaintiff, of the judgment against him, with a view to charge the defendant with the liability for full reimbursement to the former. It is said in some of the books that if a party against whom a judgment has been recovered, be charged in execution upon the judgment, it is the highest satisfaction known to the law. It seems to me that the judgment rendered by the justice at the circuit is not obnoxious to any of the objections urged against it, and that it should be affirmed.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles, Justices.*]

McDONALD vs. PIERSON and others.

The plaintiff entered into an agreement with the defendants, by which he agreed to ship and deliver to the defendants a force pump, of the value and for the price of \$60, promising that if the defendants could not make it operate he would make it work, so as to throw water all over the mills of the defendants, or that he would take it away again; the defendants agreeing that if the plaintiff would send them such a pump, on trial, they would try it, at their earliest convenience, or when they could, after which, if they liked it, they would buy it, and pay the plaintiff \$60 for it. *Held* that this was not a sale of the pump, but a conditional agreement by the defendants to purchase it at a future time.

Held, also, that the defendants were bound to try the pump within a reasonable time; and that they having kept the same in their possession for nearly two years, without making any trial of its sufficiency, or showing any valid excuse for the neglect, the plaintiff was at liberty to treat the condition annexed to the contract as waived, and was entitled to recover the stipulated price of the pump.

Held, further, that a trial or experiment of the identical pump was what the agreement required, and no other test was admissible. Hence the opinions of mechanics and experts, who, after examining the pump, had pronounced it insufficient to accomplish the purpose for which it was designed, furnished no excuse to the defendants for omitting to make a trial of the pump.

APPEAL from a judgment entered upon the report of a referee. The action was brought upon an alleged contract for the sale and delivery of a force pump, to the defendants, for the price or sum of \$60. The answer of the defendants contained a general denial of any purchase or sale. The referee reported that there was no sale of the pump to the defendants, absolute or conditional; and that they were not liable for the price, but were entitled to judgment for costs. The plaintiff appealed.

A. McDonald, appellant, in person.

S. Wakeman, for the respondents.

By the Court, WELLES, J. The complaint is upon an unconditional sale of a large sized force pump, of the value and for the price of sixty dollars. The referee reports the

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contract between the parties as follows : That on or about the 10th day of August, 1855, the plaintiff made a contract with the defendants, by which he agreed to ship and deliver the pump to them, promising if the defendants could not make it operate, he would make it operate, so as with 50 or 60 feet of hose to throw water all over the Genesee county mills, at Batavia, N. Y., then owned by the defendants, or that he would take it away again ; the defendants agreeing that if the plaintiff would send them such a pump, on trial, they would try it at their earliest convenience, or when they could, and after trying it, if they liked it, they would buy it and pay the plaintiff \$60 for it. This was not a sale of the pump, but a conditional agreement by the defendants to purchase it at a future time. The plaintiff cannot therefore recover upon the contract set forth in the complaint. But the trial seems to have been conducted without any reference to the allegations in the pleadings, and if the plaintiff has made out a case by evidence on the trial entitling him to recover at all, on the contract proved and as found by the referee, he should be permitted to recover, notwithstanding the variance between the contract stated in the complaint and the one proved. There was a motion for a nonsuit, before the referee, but no grounds were stated, and the motion was denied. If necessary to amend the complaint, in this respect or in any other, the referee had the same power to allow it as the court possesses ; and if this variance had been stated as the ground of the motion for a nonsuit, and the referee had deemed it sufficient, he would probably have allowed an amendment of the complaint, if requested, on the trial.

The referee further reports, that soon after the contract was entered into as above, the plaintiff shipped the pump in accordance with his contract, and it was received by the defendants. That late in the fall of 1855 the plaintiff called at the defendants' mills and inquired of the defendants when they would try the pump. That the defendants then stated to the plaintiff that when they finished their repairs upon

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their mill they would try it; that the plaintiff then told the defendants that if they would let him know when they got ready to try it, he would come up and make it operate as recommended, or take it away. That during the spring, summer and fall of 1856, the plaintiff called several times at the defendants' mills, at Batavia, to have the defendants try the pump. That the repairs on the defendants' mill were finished in the fall of 1856. That the defendants kept the pump in their possession until after the first of April, 1857, and then shipped it by rail road to the plaintiff at Caledonia, where he then resided. That the defendants did not at any time make any trial of the pump, but had it examined by mechanics and experts, who pronounced it insufficient to accomplish the purpose for which it was recommended. That on or about the first day of June, 1857, the pump arrived at Caledonia, and the plaintiff, on learning that fact, on the first day of June, 1857, wrote to the defendants declining to receive the pump. There were some other facts found by the referee, but they are not material to be here stated.

The referee reported, as conclusions of law upon the facts reported, 1st. That there was no sale of the pump by the plaintiff to the defendants, either absolute or conditional. 2d. That there was no breach of the contract on the part of the defendants, on account of which they were liable for the price of the pump, or damages to that amount. 3d. That because mechanics and experts after examining the pump had pronounced it insufficient to accomplish the purpose for which it was recommended, the defendants were excused from making any trial of the pump. 4th. That the time within which the defendants were to try the pump, in accordance with their contract, had expired before the 1st day of January, 1857. 5th. That the defendants had not been guilty of any breach of contract for which they were liable in damages, and that they were entitled to judgment for their costs.

The 2d, 3d and 5th conclusions of law by the referee I think were erroneous. By the agreement between the par-

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ties, the defendants were to try the pump at their earliest convenience, or when they could. That meant within a reasonable time, when it could be done. There is nothing in the whole case tending to show that the trial could not have been made within a week after the defendants received the pump, or at any of the various times when the plaintiff called on the defendants to try it. The excuse for not trying it is entirely insufficient. The opinions of mechanics and experts, as to the quality or capability of the pump, was not the test contemplated by the contract of the parties. A trial or experiment of this identical pump was what the agreement required; and no other test was admissible. This the defendants declined or neglected to apply. Having kept the pump in their possession for nearly two years, without making any trial of its sufficiency, and as I think without any reasonable excuse for the neglect, the plaintiff was at liberty to treat the condition connected with the contract as waived, and was entitled to recover the stipulated price of the pump. (1 *Pars. on Cont.* p. 450.)

For these reasons I think the judgment should be reversed, the report of the referee set aside, and a new trial ordered, with costs to abide the event. The plaintiff to be at liberty to amend his complaint if so advised, by adding another statement of his cause of action. Such amendment to be made in 20 days after notice of the order to be entered hereon, and the defendants are to have 20 days in which to answer the amended complaint.(a)

Judgment accordingly.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, E. Darwin Smith and Welles, Justices.*]

(a) On reflection, I see no necessity for ordering a new trial. No evidence was excluded that was offered on the trial, and it is all reported by the referee with his findings both of fact and law. No objections are now made to the findings of the facts, and upon the facts so found the plaintiff appears to be entitled to recover the price agreed upon for the pump, with interest from the expiration of the time in which the defendants were to make the trial,

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which the referee reports was the 1st day of January, 1857. Upon the whole, it seems to me that this court may now render the same judgment which the referee ought to have rendered, which is the price agreed to be paid for the pump, \$60, and interest from January 1, 1857, to August 1, 1862, 5 years and 7 months, \$21.35; making in all \$81.35. But my brethren entertain the opinion that a new trial must be awarded, on the ground that the defendants should be at liberty to furnish further evidence in support of their defense, if in their power.

CAMPBELL, receiver, &c. vs. ADAMS.

An assessment made upon a premium note, should be made without reference to a former assessment standing in force against the maker of the note, and as to which the assessing power of the insurance company is expended. If it includes such former assessment it will be irregular.

The surrender of a policy by the insured, and its cancellation by the insurance company, dissolves the relation of the insured as a member of the company, and the company has no further claims upon him, except for the unpaid assessments previously made.

The premium note is part and parcel of the contract of insurance, and, with the policy, constitutes the whole of the transaction. One part cannot be canceled and the other remain in full force, without the consent of both parties.

Where the decision made at the circuit is correct, but the judgment is erroneously entered, the remedy of the party is not by appeal from the judgment, but by motion at a special term, to correct the error.

APPEAL from a judgment entered upon the order of the court on a trial at the Steuben circuit, in February, 1861, without a jury.

G. H. McMaster, for the appellant.

A. P. Ferris, for the respondent.

By the Court, WELLES, J. The action was brought by the plaintiff as receiver of the Steuben Farmers and Merchants' Insurance Company, to recover the amount due upon

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a premium note, dated Cuba, May 12, 1853, given by the defendant to the insurance company for \$240, payable in such portions and at such time or times as the directors of the company might, agreeably to their charter and by-laws, require. The justice states in his findings of fact, among other things, that the policy, upon the issuing of which the note in question was given, expired May 23, 1856, when the defendant ceased to be a member of the company. That on the 31st December, 1855, the directors duly made an assessment on the defendant's note, held by the company, of \$28.62. That the defendant had notice of such assessment from the secretary of the company, who was the general agent thereof, about February 3, 1856, which notice was accompanied by a statement signed by the secretary, that a large number of policies had been surrendered and canceled that year, and that others were daily sent to the office of the company for cancellation; that it would not be prudent for the defendant to rely upon the company for insurance of his property; and that on surrender of the defendant's policy, at the office of the company, and the payment of the charges to which his premium note was subject, his liability to be assessed for the losses and expenses of said company after the day of such surrender, would cease. That the defendant, mistaking the amount of the said assessment of December 31, 1855, and supposing it was only \$2.86, on the 5th of February, 1856, inclosed that sum in a letter with his policy to the secretary at Bath, N. Y., with a request that the policy be canceled. The policy and the \$2.86 were received by the secretary, at the office of the company in Bath, on the 9th of February, and on that day the company canceled the policy on their books, and the cancellation has never been revoked or annulled. That about the 10th of February, 1856, the secretary informed the defendant by letter that the assessment on his note was \$28.62, and that he must forward the balance; and on the 7th June, 1856, he again requested the defendant by letter to remit the balance of his

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said assessment without delay, but the defendant did not remit it, and has never paid it. The company was solvent on the 9th of February, 1856, and remained solvent until and after June 7th of that year. That the defendant paid all assessments the company made on his note prior to December 31, 1855. The company was adjudged insolvent by the court, and the plaintiff appointed receiver, on the 18th day of November, 1856.

On the trial, it appeared that on the 3d day of June, 1857, the plaintiff as such receiver did, pursuant to an order of the court, make an assessment upon the premium notes in his hands, to pay the indebtedness of the company and the expenses of executing the trust, and that the defendant was then assessed \$44.67, which was duly published and demanded of the defendant, pursuant to the charter and by-laws of said company. It also appeared that \$25.87, the balance of the unpaid assessment of December 31, 1855, was included in the assessment of \$44.67, made by the receiver in June, 1857. It also appeared that the defendant was assessed in the said receiver's assessment for his share of the unpaid indebtedness of the company up to the time of the surrender of his policy, and also to pay the expenses of the execution of the trust by the receiver.

The justice at the trial held that the plaintiff was entitled to recover of the defendant only the balance unpaid of the assessment of December 31, 1855, with interest from February 9, 1856, which balance and interest amounted to \$34.83; and that the plaintiff was entitled to judgment for that sum. Also that the defendant was entitled to judgment for his costs, to be collected of the estate or fund represented by the plaintiff as receiver. Judgment was entered accordingly; excepting that it did not provide that such costs should be collected of the estate or fund represented by the plaintiff as receiver, but was simply a judgment "that the said defendant do recover of the said plaintiff

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the sum of ninety-six dollars and thirty-one cents for his costs and disbursements in this action."

We think, upon the facts before the judge at the circuit, the proper judgment was ordered.

1. The assessment by the receiver upon the defendant's premium note was irregular, in including in that assessment the previous one of December 31, 1855. He should have made it without reference to the former unpaid assessment, which stood in force against the defendant, and as to which the assessing power of the company was expended. Although in this instance no injury may have resulted to the defendant, it is an improper mode of making the assessment, and cannot be allowed. The receiver has no right thus to consolidate the alleged claims against a member of the company, who may have legal objections against one assessment which does not apply to another, and ought not to have his defense complicated and embarrassed by rolling up all the assessments into one. The assessment, if regular, is final against the defendant. It is in the nature of a judgment, although the proceedings in making it are entirely *ex parte*.

2. The surrender of the policy by the defendant, and its cancellation by the company, dissolved the defendant's relation as a member of the company, and neither they nor their receiver had any further claims upon him, except for the unpaid balance of the assessment of December 31, 1855. The note was part and parcel of the contract of insurance, and, with the policy, constituted the whole of the transaction. One part could not be canceled and the other remain in full force, without the consent of both parties. At the time the policy was canceled, the assessment made by the directors, deducting the small payment made by the defendant, was all that the company could in any event claim of him. The payment of \$2.86 was made by the defendant in good faith, supposing it was all the company required; and the act of the company in cancelling the policy, upon the receipt of that sum, shows that they intended to rely upon their claim

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for the balance of the assessment, and for which the defendant was clearly liable under the circumstances of the case.

3. If the form of the judgment, as finally entered, involves the receiver in personal liability for the defendant's costs, it is irregular. I incline to think it may have that interpretation, but this is not the place or occasion to correct the irregularity. The plaintiff's remedy for the evil is on motion at special term, and not by appeal from the judgment. All this court can do on appeal is to review the decisions made by a single judge, or by an inferior court. This irregularity, if it be one, was committed by the defendant's attorney, and not by any court or judge. The decision of the judge at the circuit on the question of costs, was correct, and the error complained of was the departure from that decision in the form of the judgment entered by the attorney, or at his instance.

The judgment should be affirmed.

Ordered accordingly.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, E. Darwin Smith and Welles*, Justices.]

DAMON vs. LEONARD HALL and wife.

Where land was purchased for a married woman, as a homestead, with her separate means, and she went into possession and made valuable improvements thereon with her own separate funds; *Held* that the arrangement between the wife and her husband in respect to such purchase, being without any fraudulent intent, was lawful, and should be sustained.

And that notwithstanding the conveyance of the property so purchased was, by mistake, made to the husband, instead of the wife, her equity was superior to that of a creditor of the husband whose debt matured, and whose judgment was recovered, long after the title to the property had passed from the husband and wife, by conveyances to bona fide purchasers.

THIS was an appeal from a judgment entered upon the report of a referee. The action was brought by the plain-

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tiff, a judgment creditor of the defendant Leonard Hall, whose execution had been returned unsatisfied, to reach certain property alleged to have been conveyed to the wife of the judgment debtor, for the purpose of defrauding his creditors. The answer denied all fraud or fraudulent intent on the part of the defendants, and alleged that the property was purchased for the wife, and paid for out of her separate estate. The action was referred to a referee, who found the following facts: That on the 7th of January, the plaintiff recovered a judgment against the defendant Leonard Hall, as indorser of two promissory notes for \$100 each; and that an execution, issued on such judgment, was returned unsatisfied. That some time in the year 1852, Mary E. Hall, the wife of the defendant L. Hall, who had separate property, both real and personal, derived from the estate of her father, who died in Canada, requested her husband to purchase for her a house and lot for a homestead. That in pursuance of such request, the said Leonard Hall bargained with one Thomas Quigley for a house and lot on Prospect street, Rochester, for the consideration of about \$1400, a part of which, being the sum of four or five hundred dollars, was, by the arrangement, to be paid by a sale to Quigley of a pair of horses and a hack, then owned by Leonard Hall, and the balance to be secured by a bond and mortgage upon the premises, payable in four equal annual installments, with interest. That Quigley was informed, at the time, that the purchase was for the benefit of the said Mary E. Hall, and that the deed was to be made to her. That subsequently, when the conveyance was prepared by the vendor, the grant was made to the husband instead of the wife, according to the directions given as above mentioned. That on Quigley's attention being called to this error, he informed Leonard Hall that it would make no difference; that his wife would be entitled to the use of the property, just the same; that to change the name would render it necessary to incur the expense of a new deed, &c.; that under these circumstances the deed was received by the

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said Lenonard Hall, his wife not being present; and when the said Mary E. Hall was subsequently informed by her husband as to the manner in which the conveyance had been made, and that it would be just as well as it was, she, relying on this representation, made no objection, but acquiesced in the same. That the hack and horses, constituting the first payment, were given to the said Mary E. Hall and transferred to the vendor, for her benefit, and not otherwise. That at the time of said purchase and gift, the said Leonard Hall was entirely solvent, owing no debts that he was not fully able to pay, and all which were paid from property other than that so given to his wife. It was further proved that the said Mary E. Hall, after taking possession of said property under the arrangement, completed the house, which was unfinished, and made other improvements on the lot out of her own money, at a cost of about \$400; and that in the same way, and from her own property, she paid the balance of the purchase money. That on the 9th day of July, 1856, the said house and lot were sold or exchanged, with the assent of the said Mary E. Hall, to John Haynes and John Lutes, she receiving in exchange fifteen acres of land in the town of Union, Monroe county. That to consummate such exchange a deed was given to her by Haynes and Lutes, in pursuance of the original understanding by which the property on Prospect street was purchased, conveyed and paid for, as above mentioned. That the said Mary E. Hall assumed the payment of a mortgage then a lien on the land in Union, given to one Smith, upon which there was then due about \$500, being the agreed difference in the lands thus exchanged. That upon this mortgage she subsequently paid all over the sum of \$350, which remained due on the 31st of May, 1859. That this payment was made from her own funds, without any thing being advanced by her husband. That on the said 31st of May, 1859, Hall and wife conveyed the premises in Union to E. M. Moore, by warranty deed, duly recorded. That as a consideration for said conveyance, Moore and wife

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conveyed to Mary E. Hall certain lots of land in the city of Rochester by two several deeds, dated May 26, and June 2, 1859, respectively. That there was no consideration paid to said Moore, for his conveyances, other than the said land in Union, and the assumption on his part of the payment of \$350, being the balance due upon the Smith mortgage. The referee further found as a fact, from the evidence, that the conveyances of July 9, 1856, were made and received in good faith, without any intent to hinder, delay or defraud the plaintiff or any other creditor of Leonard Hall. 2d. That Leonard Hall was not insolvent on the 9th of July, 1856, but became insolvent subsequently, and continued so until and at the rendition of the judgment of the plaintiff. 3d. That the conveyances made to and received from Moore were made and received in good faith.

The referee found, as conclusions of law : 1. That the conveyance from Haynes and Lutes, of July 9, 1856, to Mrs. Hall, being the consummation of an arrangement between herself and husband, in virtue of which she advanced her own money to complete the dwelling and to pay for the lot on Prospect street, was valid, and vested the whole title, legal and equitable, in the lands in Union, in the former. 2. That the relief claimed by the complaint should be denied with costs. Judgment was entered accordingly, and the plaintiff appealed.

W. F. Cogswell, for the appellant.

John McConvill, for the respondent.

By the Court, WELLES, J. The report of the referee shows that the house in Prospect street was purchased for the defendant Mary E. Hall, and with her separate means, in 1852, but by mistake the conveyance was made to her husband, the defendant Leonard Hall. The \$500 or \$525 alleged to have been paid by the defendant Leonard Hall was paid in per-

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sonal property, a hack and a span of horses, which he gave to his wife at a time when he was perfectly solvent and had a right to make the gift. Notwithstanding the conveyance was made to the husband by Quigley, the grantor, Mrs. Hall went into possession and made valuable improvements with her own separate means. That on the 9th day of July, 1856, before either of the notes had matured, and while her husband continued solvent and unembarrassed, Mrs. Hall sold the Prospect street property to Haynes and Lutes, and received in exchange fifteen acres of land in the town of Union. That to consummate such exchange, the deeds were given as mentioned in the complaint; that is to say: The defendants, Hall and wife, conveyed the Prospect street house to Haynes and Lutes, who at the same time conveyed the land in the town of Union to the defendant Mary E. Hall. Afterwards, and on the 31st of May, 1859, another exchange was made by Mrs. Hall of the property in Union, with Edward M. Moore, for several city lots in the city of Rochester. The deed for these lots was made by Moore to Mrs. Hall, and the latter joined with her husband in a conveyance of the Union property to Moore. The property in Prospect street was purchased for Mrs. Hall as a homestead, as early as 1852.

It is distinctly found by the referee that the conveyances of July 9th, 1856, being the one from Hall and wife to Haynes and Lutes for the Prospect street house and lot, and the one from the latter to Mrs. Hall of the property in the town of Union, were made and received in good faith, without any intent to hinder or delay or defraud the plaintiff, or any other creditor of the defendant Hall.

The fraud charged in the complaint being thus disproved, there remains no foundation upon which the action can rest. The legal title to the Prospect street property had passed from the defendant Leonard Hall to Haynes and Lutes long before judgment was obtained on the notes, and, as remarked, before the maturity of either of them, and there was never any legal lien by virtue of the judgment upon any or either

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of the parcels of land mentioned ; and the transactions being free from any taint of fraud, the equity of Mrs. Hall is superior to that of the plaintiff. The arrangement between her and her husband in relation to the purchase of the Prospect street house and lot with her separate means and without any fraudulent intent, was lawful, and should be sustained.

I think the judgment should be affirmed with costs.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Campbell and Welles*, Justices.]

BOLTON, administrator, &c. *appellant*, vs. SMEAD and others,
respondents.

On the settlement of the accounts of an administrator, before the surrogate, in 1861, the administrator offered himself as a witness to show what took place between himself and his intestate in reference to the making of a note, and to show that he signed the note at the request and for the benefit of the intestate, as his surety. *Held* that under the law as it then existed, previous to the amendment of section 899 of the code, in 1862, he was a competent witness.

THIS was an appeal from a decree of the surrogate of the county of Livingston, made on the final settlement of the accounts of the appellant as administrator of &c. of Allen Smead, deceased. On the accounting the administrator presented, as a claim, an account of \$1186.52, for money paid by him on a judgment recovered against himself and Lyman H. Smead, which was obtained on a note executed by the deceased, in his lifetime, and by the appellant and Lyman H. Smead. The appellant claimed that he executed the note for the benefit and at the request of the deceased, and that the execution of the note by Lyman H. Smead was an act long subsequent, procured by the deceased and the payee, without the knowledge or consent of the appellant. The heirs contested the claim, and alleged that the note was exe-

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cut by the deceased and the appellant as surety for Lyman H. Smead. The administrator offered himself as a witness to show what took place between himself and the deceased in reference to making the note, and to show that he signed the same at the request of and for the benefit of the intestate. The testimony was objected to by the heirs, and excluded. One half of the claim was rejected by the surrogate, and disallowed.

F. G. Wicker, for the appellant.

McNiel Seymour, for the respondents.

By the Court, WELLES, J. The objection that the surrogate should have allowed the appellant to testify in his own behalf as to what took place between him and the intestate, in reference to making the note in question, &c., must be determined upon the law as it existed at the time of the hearing before the surrogate, which was in June, 1861. At that time the exception in section 399 of the code, bearing upon the question, was as follows: "except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transactions had personally between the deceased and the witness." The evidence offered and excluded was not offered and would not have operated against a party who was the representative of a deceased person. The only party in the case who sustained that relation was the appellant himself, and therefore the exception in the section did not apply to him, unless the singular ground can be maintained that the testimony was offered by the appellant against himself in his representative character, which it seems to me was not within the contemplation of the legislature. This view derives strength from the fact that the legislature of 1862 amended the 399th section of the code so as to adapt it to precisely such a case as the present.

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If my brethren concur with me in the foregoing, it will be useless to consider the other points raised; as, in case of a new trial, the evidence offered would be inadmissible, under the last amendment, and the appellant would have to rely on other evidence to establish his claim.

The decree of the surrogate should be reversed, and the proceedings remitted to the surrogate for a new rehearing.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles*, Justices.]

GEORGE W. McDOWELL vs. CHARLES W. DANIELS.

THE SAME vs. THE SAME.

EBENEZER DANIELS vs. CHARLES W. DANIELS.

GEORGE W. McDOWELL vs. THE SAME.

Requisites and sufficiency of the statement of indebtedness upon which to enter a judgment by confession.

It was not the object of the statute requiring such statement, to compel the debtor to state enough of the transaction out of which the indebtedness arose to enable other creditors to form an opinion, *from the facts stated*, as to the integrity of the debtor, in confessing the judgment; but to require him to state enough of the facts to enable creditors to inquire into the transaction, and to form an opinion of the honesty of the judgment, *from the facts they shall ascertain*.

A statement alleging that the judgment is for "cash loaned to defendant for his use in the year 1854, and there is unpaid on said loan one thousand and seventy dollars," is insufficient.

A statement alleging that the judgment is for cash loaned the defendant, and paid for his use and at his request, and interest thereon; stating various sums or items with sufficient particularity as to time, making up the sum for which judgment is confessed; but not stating which items or sums were loaned to the defendant, and which were paid for his use; and not distinguishing at all between the sums loaned to the defendant and the sums paid for his use; nor stating to whom any item or sum was paid for the use of the defendant, is insufficient.

Judgments by confession, entered on insufficient statements, being by the statute pronounced void, as to other judgment creditors, cannot be supported by affidavits, on a motion to set them aside for irregularity.

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APPEALS from orders made at a special term setting aside the judgments entered by confession in the first two of the above cases, and denying a motion to set aside the judgments in the last two cases.

By the Court, SUTHERLAND, J. The statute (*Code*, § 383) requires that the statement to sustain a judgment by confession, for money due or to become due, should set forth concisely "the facts out of which it arose, and must show that the sum confessed is justly due or to become due." If the judgment be for the purpose of securing the plaintiff against a contingent liability, "it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same."

The judgment in favor of George W. McDowell for \$9000 and costs, purports to be for money to become due; and the statement on which it was entered states the facts upon which the confession of judgment is founded, as follows: "A bond of Charles W. Daniels, dated December 1st, 1858, for nine thousand dollars, given for the balance of purchase money for certain real, mill property, in Steuben county, town of Canisteo, conveyed by George W. McDowell to Charles W. Daniels." We have here a concise statement of the facts out of which the debt of \$9000 to become due arose, and the date and consideration of the bond. The statement is, that it was given by Daniels to McDowell for the balance of the purchase money of certain real estate, mill property, in the town of Canisteo, Steuben county, conveyed by McDowell to Daniels. It is true, it is a *concise* statement of the facts out of which the consideration of the bond arose. Whether the mill property was a saw-mill or a grist-mill, or propelled by wind, water or steam; or whether, if a grist-mill, it had one or more run of stones, or how much land constituted, or was connected with, the mill property; or what the whole price or purchase money was, is not stated; but we have the fact and time of the conveyance for money

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plainly imported, and the balance due for the purchase money expressly stated. The debt, or consideration of the bond, was the balance of purchase money, and arose out of the sale and conveyance of the real estate; but I am not prepared to say that a concise statement of the facts of the sale and conveyance involves a statement of the precise amount of purchase money paid and agreed to be paid. If \$9000 was justly owing and to become due from Daniels to McDowell for the balance of purchase money, why should other creditors of Daniels be informed as to the number of acres sold, the whole price or purchase money paid and agreed to be paid; or how could such other creditors be benefited by a particular description of the mill property conveyed? Other creditors of Daniels are not obliged to take his statement under oath, that the debt is justly due, or to become due. They have a right to inquire into the honesty of the debt and of the transaction. To enable them to do so—to get on the track of the fraud if there is any—the statute requires the *concise* statement of facts. This statement gives enough of the transaction, I think, to enable other creditors of Daniels to inquire into its truthfulness, and the honesty of the alleged debt.

I do not think it can properly be said that the object of the statute was to compel the debtor to state sufficient of the transaction out of which the indebtedness arose, to enable other creditors to form an opinion *from the facts stated*, as to the integrity of the debtor in confessing the judgment. If the debt is questioned, it is not to be presumed that the creditor questioning will take the debtor's statement, however full. What the creditor wants, and what I think the statute intended he should have, is sufficient of the facts to enable him to inquire into the transaction, and to form his opinion of the honesty of the judgment from the facts *he shall ascertain*.

It is true, the statement does not say when the money is to become due; but if it is a just debt, and to become due,

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does it make any difference to other creditors when it is to become due? The statute allows a just debt, to become due, to be secured by confession of judgment. I think the statement is sufficient to sustain the judgment.

It would not be very profitable to examine, or even refer to, the various and numerous decisions on the question of the sufficiency of particular statements. In *Thompson v. Van Vechten*, (5 *Abbott*, 458,) the statement was, that the indebtedness arose on a sale and conveyance by the plaintiff to the defendant. It did not distinctly state that the indebtedness was for the purchase money, or part of the purchase money.

I think, also, that the statement on which the judgment in favor of McDowell for \$1710.93 and costs was entered, is sufficient. It plainly imports that the drafts therein mentioned were indorsed by McDowell for the benefit of Daniels, the drawer. It says that the judgment is confessed for a debt justly owing and to become due to McDowell; that all the drafts were drawn on Samuel Hallett & Co., without funds in the hands of the drawees; that McDowell is liable to pay them all when due, including the one alleged to have become due and to have been protested. The date and amount of each of the drafts, and the time they had to run, is given. The day when each is due is also mentioned, except the first, which is stated to be "dated October 27, 1859, at 84 days, payable at Metropolitan Bank." I do not see very well how this statement could have been more complete, and I think it abundantly sufficient. It is true the drafts may in fact have been drawn for the benefit of McDowell, the indorser, but such fact would be plainly inconsistent with the plain import of the statement. At all events, facts are stated with sufficient certainty as to time, amounts, &c., to enable other creditors to inquire into the transactions, and the honesty of the judgment. I think *Dow v. Platner* (16 *N. Y. Rep.* 562) may be cited to show that this statement is sufficient. It was not necessary for the statement to negative a fact inconsistent

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with its plain import. (*Lanning v. Carpenter*, 20 N. Y. Rep. 448, *opinion of Comstock, J.*, p. 559.)

I am inclined to think that the statements on which the other two judgments were entered, one in favor of Ebenezer Daniels for \$1070 and costs, and the other in favor of George W. McDowell for \$1224.04 and costs, are insufficient. The statement in the case of Ebenezer Daniels is, that the judgment is for "cash loaned to defendant for his use in the year 1854, and there is unpaid on said loan one thousand and seventy dollars." It may well be doubted, whether this is even a concise statement of the facts out of which the alleged indebtedness arose. The debt for which the judgment is confessed arose out of the transaction in 1854. The balance alleged to be due, for which the judgment is confessed, is the result of the transaction in 1854. The transaction in 1854 is alleged to have been a loan to the defendant. I think the statement fairly imports a loan by the plaintiff to the defendant; but it does not state or import how much, or what sum was so loaned in 1854. Where the whole transaction is simply a loan of money by the plaintiff to the defendant, certainly even a concise statement of it calls for the amount or sum loaned. How much of the \$1070 was loaned, and how much, if any, is for interest, the statement does not say.

The statement on which the judgment in favor of McDowell for \$1224.04 and costs was entered is, that it is for cash loaned the defendant, paid for his use and at his request, and interest thereon, stating various sums or items with sufficient particularity as to time, making up the sum of \$1224.04; but it does not state which items or sums were loaned to the defendant, and which paid for his use. It does not distinguish at all between the sums or items loaned to the defendant, and the sums or items paid for his use. Nor does it state to whom any item or sum was paid for the use of the defendant. This cannot be called even a concise statement of the facts out of which the alleged indebtedness of \$1224.04 arose. Other creditors have a right to have the

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names of the party or parties to whom the money was paid for the use of the defendant. They ought not to be compelled to resort solely to the parties to the judgment for information as to its integrity, if the nature of the transaction is such that other parties may give information.

I have not referred to the affidavits presented to support the judgment, for it is very plain that they having nothing to do with the question of the validity of these judgments, or with these motions. The question is one of regularity—of statutory regularity. The court of appeals have held that the statute intended to pronounce judgments by confession entered on insufficient statements, fraudulent and *void* as to other judgment creditors. (*Dunham v. Waterman*, 17 N. Y. Rep. 9.) How can a thing pronounced void by statute, be amended by affidavit?

The orders of the special term, setting aside the two first above mentioned judgments, and denying the motion to set aside the two last mentioned judgments, should be reversed, severally, with costs.

[NEW YORK GENERAL TERM, September 16, 1861. *Clerke, Sutherland and Barnard*, Justices.]

THE TRUSTEES OF THE THEOLOGICAL SEMINARY OF AUBURN, and others, *appellants*, vs. MINERVA CALHOUN, *respondent*.

One of the subscribing witnesses to a will testified that she saw the testator sign his name, at the end of the paper; that he then said "we want you to sign this;" that she did sign her name to a paper, in his presence; but did not hear him say that it was his last will and testament; that she heard the other subscribing witness say, in the testator's presence, at the time the latter signed the instrument, that it was the testator's last will and testament; but that there was no word or sign of assent by the testator; and that he was deaf, and in her opinion did not hear all that was said. *Held* that this was not sufficient evidence of a due *publication*, to authorize the surrogate to admit the will to probate. BACON, J. dissented.

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Notwithstanding the failure of one witness to remember that all the statute formalities were complied with, if they are proved by the other to have been observed, the will will be admitted to probate.

But before this principle can apply, the surrogate must be satisfied that the witness testifying to a compliance with the requisite forms is truthful—that he is telling the transaction precisely as it occurred. If one witness undertakes to swear to matters which the other swears never occurred, it is for the surrogate to say which he will believe.

THIS is an appeal from a decision of the surrogate of the county of Cayuga, rejecting the paper propounded as the last will and testament of Peter Douglass, deceased, and deciding that the same was void, on the sole ground that it was *not duly published* by the testator. The deceased was a very aged man, about 85, and quite hard of hearing, and quite feeble; but had at all times superintended all his business. He had a large farm of over 400 acres, and a good deal of personal property. The respondent was his only child, and she was a widow with five children, and lived with the deceased. The will gives her and her children all his real estate; and gives, besides, to each of them legacies, and life annuities to be paid from the income of his personal property. The residue of the personal estate, after the payment of legacies, and setting apart a fund sufficient to meet the life annuities, is given to the appellants, the Trustees of the Theological Seminary of Auburn, and the Trustees of the Presbyterian House of the city of Philadelphia, for charitable purposes, specified by the testator in instructions given by him to the appellants, but not specified in the will. It also gives to the appellants the fund given to provide for the annuities, whenever the same shall become released from time to time by the death of the annuitants. There were but two persons present at the execution, Frederick Starr, jun. and Mary Fitzgibbon, a domestic in the family; the latter was in the room but a few minutes to witness it. The probate of this will was resisted by Mrs. Calhoun, the heir at law, on the grounds of the feebleness of the testator, and his inability to resist the influences brought to bear upon him; and

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also for a lack of due publication of the will. The following facts were proved, before the surrogate:

The testator sent for Starr, one of the witnesses, to draw a new will. The only alterations from a former will he desired to be made, or that were made, related to his charitable bequests. Starr spent the day with him in preparing the will. The devises, legacies and annuities to his daughter, Mrs. Calhoun, and her children, were copied literally from the former will. After the will was prepared, he desired that Starr, and Mary, his servant girl, should be the witnesses, and said to Mrs. Calhoun, "call Mary to witness this will." When she came in, Starr testifies that Mr. Douglass said to her, "I want you to witness this instrument, or paper, one or the other word," * * "it is my will." But Mary testifies that when she came in she "sat down in the chair by the stand, and Mr. Douglass said, 'we want you to sign this.' That was all I can remember. Mr. Douglass did not call it his will. Mr. Starr did say it was Mr. Douglass' will." This last declaration is repeated several times. She says, "I heard Mr. Starr say at the time Mr. Douglass signed the instrument, that it was Mr. Douglass' last will and testament. He referred me to the margin with red ink notes, and then turned over the pages and said it was Mr. Douglass' last will and testament. Then Mr. Douglass signed it. There was a separate paper concerning Sarah. Mr. Starr said, 'sign that.' Mr. Douglass said, 'I will sign in both places.'" She also testified—"I can't say as Mr. Starr read the attestation clause to me or not." "I think Mr. Starr took up the instrument and read something to me before I signed it. I can't say what it was." Again she testified—"I did not know the paper I signed was a will, from any thing Mr. Douglass said. All Mr. Douglass said to me was, 'we want you to sign this.' I can't say as Mr. Douglass said any thing about the seal, to me. Mr. Douglass was hard of hearing—very hard. When Mr. Starr spoke to me about signing the will, and that it

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was Mr. Douglass' last will, don't think Mr. Douglass heard all of it, judging from my experience with him."

John Porter, for the appellants.

Cox & Avery, for the respondent.

MULLIN, J. To authorize a surrogate to admit a last will to probate, it must be executed and attested in the following manner: 1. Subscribed by the testator at the end of the will. 2. Such subscription shall be made in the presence of each of the attesting witnesses, or shall be acknowledged to have been so made to each of the witnesses. 3. When the testator subscribes the will, or makes the acknowledgment, he shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be two witnesses, who shall sign at the end of the will, at the request of the testator. (3 R. S. 5th ed. 144, § 35.)

In *Coffin v. Coffin*, (23 N. Y. Rep. 15,) it is said that the declaration that the instrument is the last will and testament need not be in any particular form; any communication of the testator, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement. In that case both witnesses were present, and one of them asked the testator if he wished him to sign or witness the will; and the testator answered in the affirmative. This was held a good publication, by the judge delivering the opinion. There can be no doubt that such a declaration can be made in answer to a question, or even by a sign. It is only required that it be understandingly made.

In *Lewis v. Lewis*, (1 Kern. 226,) Allen, J. says: "To satisfy the statute, the testator must in some manner communicate to the attesting witnesses, at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his last will and testament, by some assertion, or some clear assent in words or signs; and the declara-

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tion must be unequivocal. The policy and object of the statute require this; and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere, and from other sources, learned that the document which they are called to attest is a will; or that they suspect or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence; that they may not only know the fact, but that they may know it from him, and that he understands it, and at the time of its execution, which includes publication, designs to give effect to it as his will. And to this, among other things, they are required by statute to attest."

Keeping in mind this construction of the clauses in question, let us proceed to examine the evidence given before the surrogate, in order to see whether it comes up to the standard established by the courts. Mary Fitzgibbon was one of the witnesses, and subscribed her name at the end of the will, as required by the statute. The certificate signed by her is in the usual form; but it is not of itself evidence to prove the due execution of the will. She was therefore called before the surrogate, and her examination under oath reduced to writing; and in that examination she testifies that she saw the deceased sign his name at the end of the paper. He said he wanted her to sign her name to a paper. She did so. Did not hear him say that it was his last will and testament. She signed it in his presence.

It cannot be seriously claimed that upon the evidence thus given, the statute has been complied with. On the contrary, the most important requirements are entirely disregarded. If we go to her oral evidence, taken on a more full and direct cross-examination by counsel, the case is not changed. She says: "I heard Starr say at the time Mr. Douglass signed the instrument, that it was Mr. Douglass' last will and tes-

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tament. He referred me to the margin with red ink notes, and then turned over the pages and said it was Mr. Douglass' last will and testament. Then Douglass signed it. There was a separate paper concerning Sarah. Starr said, 'sign that.' Douglass said, 'I will sign in both places.' Think he signed the one concerning Sarah first; then he signed the other opposite the seal. I sat down in the chair by the stand, and Douglass said, 'we want you to sign this.' Mr. Douglass did not call it his will. Starr said it was Douglass' will. Douglass did not say to me, I want you to witness this instrument. He did not tell me what it was. Douglass signed it, and then put his finger on the seal." On her cross-examination she says she supposed it was a will, because Starr told her so, and because Huggins had been there a few days before, making a will. All Douglass said was, "we want you to sign this." Douglass was very hard of hearing. She also testified that she had been in Douglass' employ for some time, and she did not think, judging from her experience with him, that Douglass heard all Starr said when he spoke to her about signing the will, and that it was Douglass' last will. She testifies to other matters, but the foregoing is the substance of the evidence on the subject of the execution of this will; and I repeat, it falls very far short of establishing a legal execution of it. Not one word is spoken by Douglass, except to say that he wanted her to sign this; and she thinks it probable he may have said, pointing to the will, that it was his. Starr said it was Douglass' will, in his presence, but there was no word or sign of assent, or any indication that he understood what was said. This would be enough to prevent probate; but superadded to this is the evidence of great deafness, and of the opinion of the witness, founded on her acquaintance with him, that he did not hear what Starr said.

But notwithstanding the failure of one witness to remember that all the statute formalities were complied with; if they are proved to have been complied with, by the other,

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the will will be admitted to probate. (*Nelson v. McGiffert*, 3 Barb. Ch. Rep. 158.)

Starr, the other witness, testifies with the greatest minuteness to the doing of all the statute requires to be done in order to constitute a valid execution and publication of a will, and within the case of *Nelson v. McGiffert* due publication was established. But before the principle can apply, the surrogate must be satisfied that the witness is truthful—that he is telling the transaction precisely as it occurred. If one witness undertakes to swear to the matters which the other witness swears never occurred, it is for the surrogate to say which he will believe. The difficulty in this case is not that the witness Mary Fitzgibbon has forgotten what occurred; but it is that she recollects that the essential things required by the statute were not said or done.

I think the surrogate was right in holding that he could not, on Starr's evidence, admit the will to probate. He was personally interested in the fund willed to the corporations; and he had most unfairly withheld all information on that subject, when he could not have forgotten that he was entitled to demand five per cent on the money given through his agency, to the corporations of which he was agent. Add to this his own statement of his intercourse with the testator, the influence brought to bear upon him to obtain money for these corporations, his bodily infirmities, his great age, the opportunity afforded to practice on his religious or benevolent feelings, the manner in which, and the steps by which, a gift and bequest obviously greatly beyond what the testator originally intended to give to such purposes were obtained; all conspire to convince me that this will ought not to be admitted to probate on the evidence furnished to the surrogate.

It is quite clear that the surrogate means to rest his decision on his want of confidence in the evidence of Starr, and his belief that the witness Mary has honestly stated what transpired on the occasion of the execution of the will.

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On this ground I think he was right, and that his decree should be affirmed with costs.

MORGAN, J. concurred.

BACON, J. (dissenting.) Nothing can well be clearer than that the will of Peter Douglass, concerning which this controversy has arisen, expressed the deliberate mind and purpose of the testator. He had no intention of dying intestate, and he had for some time cherished the design of making large benefactions to what he considered benevolent and religious objects. He caused to be prepared and had executed two wills before the one in question, and in respect to the will which immediately preceded the one which was offered for probate, the same general plan and purpose was manifested, and it is important to remark that the provisions made for his family, and the relatives to whom he made specific bequests, were precisely the same with those in the will now before us. No question, moreover, is now made in regard to the competency of the testator to make a will, although the opposition to the probate started upon that theory, and was apparently maintained to the close of the hearing before the surrogate. It is conceded that the testator was a man of clear intellect, good business capacity and sound judgment; or in the emphatic words of Mr. Cox, the counsel for the contestants, when called as a witness before the surrogate, "He was a man of uncommon method, regularity, deliberation, prudence and exactness." In short, there was, and there can be, no reason to doubt his capacity to make a will.

On the occasion when this will was signed by him, it is equally clear, if the slightest credence is to be given to the testimony of Mr. Starr, the testator sought industriously to comply with all the forms which the law has prescribed as necessary to the due execution of a will. He was not a stranger to those requisitions, for he had already executed two wills and five codicils, between the years 1856 and 1859,

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and the will immediately preceding the one in question only a few days before. A man of his intelligence, exactness and persistency would not be very likely to omit any formality which he had been taught was necessary to give effect to what he intended to be his matured will, the well considered purpose of his mind, and the crowning act of his life.

The controversy then is narrowed down to a single inquiry. The surrogate refused to admit the will to probate on the sole and specific ground that "it was not duly published as the last will and testament of the deceased," and that is the only point before us on this appeal. The provisions of the statute in regard to the execution of wills are very familiar, and consist of four things, to wit: Subscription by the testator, making or acknowledgment of the same before witnesses, publication of the instrument as a will, and signature by the witnesses. The language of the 3d subdivision requires "a declaration by the testator, at the time of making or acknowledging the subscription, that the instrument so subscribed is his last will and testament."

At the time of the execution of the will of Peter Douglass, the only persons present and in the room were the two attesting witnesses, Frederick Starr and Mary Fitzgibbon. The former was the agent of the Western Education Society and the Auburn Theological Seminary. He had had previous consultations and protracted discussions with the testator in regard to the provisions he intended to make of a charitable nature, and had drawn up the will in question, copying many of its provisions literally from the previous will, and obviously knew all that was necessary to be done to complete the execution. The latter was a servant in the family, sent for by the testator for the express purpose of witnessing the will. The testimony of Starr is clear and explicit that there was a full compliance with all the requirements of the statute in relation to the execution of wills.

The surrogate, in the elaborate opinion with which we have been furnished, concedes this, and adds, that "so great

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particularity and completeness in the publication of a will had rarely, if ever, come under his observation." Upon this minuteness and particularity, however, coupled with what the surrogate considered the somewhat questionable position in which he stood in reference to the benefactions of this will, the surrogate founds a criticism somewhat unfavorable to the candor and disinterestedness of this witness. The fact appeared that the compensation of Mr. Starr depended to a considerable extent, if not entirely, upon his success in bringing funds into the treasury of the seminary, and he was paid by a per centage upon the amounts ultimately received from gifts and bequests to the institution. It gave him a pecuniary interest in the results, and, judging from the ordinary operations of the human mind, would make him solicitous not only to procure such bequests, but intent and keen to secure their realization. The arrangement was undoubtedly highly objectionable, and is only another illustration of the manner in which good men, in pursuit of what they deem to be, and doubtless are, worthy objects, sometimes seek to compass them by means and agencies which men of mere worldly experience and sagacity instinctively condemn. It is, to say the least, an unfortunate and ill judged arrangement, and the sooner it is abandoned the better for the fair fame of the institution, and the protection of the agent from what are not unnatural, but doubtless are very uncharitable surmises.

But it is obvious to remark that these considerations to which the surrogate refers, would very strongly tend to arouse the attention and quicken the diligence of the witness, and thus make it probable that his narration of the facts attending the execution of the will, provided all confidence in his integrity was not lost, would be far more reliable than that of a witness hastily summoned to perform a novel office, and whose testimony is in many points uncertain and indistinct, and in all its aspects much less distinguished than that of Mr. Starr by intelligence, and the faculty of clearly observing and fully recalling the incidents that marked the occasion,

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Unless the surrogate wholly discredited the testimony of Starr, it seems to me impossible to sustain his conclusion that there was no publication of the will. That he did not thus discredit him is clear from his own declaration, where, in speaking of the manner of his testifying, he says, "without reflecting upon his credibility, I am impelled to the conclusion that the judicial mind cannot rest with such *entire confidence* upon his testimony as to discredit that of the other subscribing witness." There is nothing in the matter of Starr's testimony that should discredit him; and if, as we may infer from the language of the surrogate, there was nothing in his manner of testifying that awakened his suspicions, I see not why his testimony is not entitled to full belief. If so, there is an end to the question; because it is quite clear that the non-recollection of one witness will not defeat the proof of a will, if the other is competent to, and does in fact, supply the necessary evidence.

In this connection I cannot refrain from quoting the language of Judge Comstock in *Coffin v. Coffin*, (23 N. Y. Rep. 14,) as strikingly applicable to the condition of these two witnesses: "As the case appears to us," he says, "without their actual presence, we should certainly think the evidence of Mr. C. to be altogether the most reliable. That he had much greater intelligence in regard to a subject of this nature, cannot be doubted. Indeed, we have every reason to conclude that he had, before preparing this will, made himself fully acquainted with the formalities which the law required. From his situation and relation to the transaction, his attention must have been given to all the particulars, and his evidence is direct and positive. On the other hand, the subscribing witnesses were called into the presence of the testator for the purpose of attestation only, and their failure to state all the facts to which the other witness deposed, may not unreasonably be referred to their want of attention or of memory."

There is no reason whatever, from any thing that appears

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in this case, to discredit the testimony of Mary Fitzgibbon on the score of want of integrity; failure of memory, or want of sufficient attention, or a moderate degree of intellect, might readily account for the fact that she does not recall words and incidents which the other witness states with great distinctness and with unquestioned intelligence. The surrogate chooses to put his decision, not on the ground that he entirely discredited Starr, but that as the testimony of the two witnesses directly contradicted each other as to the fact of publication, he preferred to rely on the recollection, or rather want of recollection, of the girl. I confess this seems to me a very unsafe reliance, and, as I have said, the conclusion is one hardly to be warranted, except by setting aside the testimony of Starr as wholly unworthy of belief. But I think it by no means clear that the testimony of the two witnesses is so varient as to justify the conclusion that they directly contradict each other on the point of publication, and in collating the two, it seems to me the surrogate hardly does justice to either.

The testimony of Mary leaves us in doubt whether Starr did not read the attestation clause. She says in one part of her testimony, "I can't say as Starr read the attestation clause to me, or not;" and subsequently she adds: "I think Starr took up the instrument, and read something to me before I signed it; I can't say what it was." Now if Starr did read something to her, before she signed her name, it was beyond doubt the attestation clause; and if he did, and it was heard by Douglass, this would be, within the case of *Brinkerhoff v. Remsen*, (8 Paige, 499,) a perfectly good publication. It is not necessary to spend time upon the authorities which declare what shall be a sufficient publication of a will within the statute. It is sufficient to state, as a concise summary of the whole, that the provision in regard to publication is satisfied if the proof shows that the testator knew the nature of the instrument he executed, and that the witnesses were informed at the time that it was his will, either

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by himself, or by any one acting for him, and in his presence See *Brinckerhoof v. Remsen*, (8 *Paige*, 488; *S. C.*, 26 *Wend.* 325;) *Seguine v. Seguine*, (2 *Barb.* 385;) *Torry v. Bowen*, (15 *id.* 304;) *Nipper v. Groesbeck*, (22 *id.* 670;) and the very recent case in the court of appeals of *Coffin v. Coffin*, (23 *N. Y. Rep.* 9,) in which case Comstock, J. says that "any communication of the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the statute." The important and the only important thing to be established is, that the testator understands, and the witnesses know, that the instrument signed and attested, is executed as a will. That the testator in this case knew what the instrument was, and intended to perform every act which the law requires to make a perfect execution, is beyond controversy; and I think it will not be questioned that Mary Fitzgibbon knew well enough the nature of the instrument, although this fact was not brought to her remembrance, and may not in fact have been communicated to her by the testator. In her testimony she says distinctly, "I heard Mr. Starr say at the time Mr. Douglass signed the instrument, that it was Mr. Douglass' last will and testament. He referred me to the margin, and then turned over the pages and said it was Mr. Douglass' last will and testament, and then Mr. Douglass signed it." The request the testator made to her, after signing his name, was, as she states it, "I want you to sign this;" and she signed it, as she says, "right before Mr. Douglass."

It is true she says she did not know the paper was a will from any thing Mr. Douglass said; but in the same connection in which she speaks of the declaration of Starr that it was the last will of Douglass, she gives testimony which, coupled with a statement of Starr in reference to the same transaction, established the fact of publication beyond reasonable cavil. The law is well settled that the requirement of the statute on this subject is satisfied, if it appears from the testimony that the subscribing witnesses knew at the time

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they subscribed the instrument, from communications made to them by the testator, or other persons *in his presence and acting in the matter for him*, that the instrument was the testator's last will and testament, and was executed as such. (*Torry v. Bowen*, 15 Barb. 305.) Now the testimony here is unequivocally that Starr declared the instrument to be the last will and testament of Mr. Douglass, in his presence, and while all were engaged in the execution, and this declaration the other witness distinctly heard and clearly understood. But the question is made, whether this declaration was heard by the testator. I have not forgotten the fact that the testator was very deaf, and under ordinary circumstances it might be urged with considerable force, as it has been here, that from this infirmity it is very doubtful whether all this did not pass in dumb show before his eyes, and that as he gave no outward and visible sign, but remained silent and inactive, it is to be inferred that he did not hear, and so did not assent to the statement. I am not prepared to say that this inference should of itself be sufficient to establish the want of publication of the will; but there is some affirmative evidence on this very point, that seems to me to overcome that inference, and conduct the judicial mind to a fair conclusion that the declaration of Starr was heard, and assented to, and thus publication made of the will.

We have seen that the declaration was made, by the concurring testimony of both witnesses. It was in the immediate presence of the testator, and directly under his eye. Starr says that when he spoke to Mary and told her it was Mr. Douglass' will, he spoke loud enough "so that Mr. Douglass heard it;" and his position he says was at the time within two feet of the testator, and within a foot of his ear. It may be conceded, although the testimony is in the form of a positive assertion, that this is only matter of opinion. On a question of this nature, this is the most we can ever have, unless a response is given which establishes the fact. The testimony of Mary on this point is as follows: "When Mr.

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Starr spoke to me about signing the will, and that it was Mr. Douglass' last will, I don't think Mr. Douglass *heard all of it*, judging from my experience with him." The surrogate, in alluding to this testimony of the witness, by a singular inadvertence quotes her as saying, "I don't think Mr. Douglass heard what Mr. Starr said to me." This is not her language. She does not think, she says, the testator heard "all of it." Now who shall say what part he did or did not hear? Was it the part in which the witness was requested to sign, or the portion which contained the declaration that it was the will of Douglass, or was it parts of both? If he heard the statement that it was his will, it was enough to satisfy the statute in regard to publication, and he himself requested her to sign the paper. If presumptions are to be indulged, they should be such as will uphold a will so carefully considered, so deliberately matured, as this appears to have been, and not to overthrow, annul and defeat the manifest purpose and intent of the testator.

From all the examination I have been able to give this case, it is my deliberate conviction that the will of Peter Douglass was in all respects well executed, and the decree of the surrogate should accordingly be reversed, and the proceedings remitted to him with directions to admit the same to probate.

Decree affirmed.

OSWEGO GENERAL TERM, July 8, 1862. *Mullin, Morgan and Bacon, Justices.*]

FISH and others vs. DODGE.

A mere contractor, though upon a public work, who is not a public officer, is not liable to third persons, for damages occasioned by the non-performance of the obligations of his contract.

There is a material and plain distinction between obligations or duties imposed by law—as upon public officers—and those created by contract, merely. In regard to the former, they are created for the benefit of, and are due to, every one who has occasion for, or an interest in, their performance; and hence any one who sustains an injury which is peculiar to himself, by means of their non-performance, or their improper performance, may maintain an action against him who owes the duty, to recover the damages thus sustained. But as to the latter, they rest between the contracting parties alone, and none but parties, or privies, can enforce them, or maintain an action to recover damages for a neglect or refusal to perform them. Accordingly *held*, that one who had entered into a contract with the state, to keep a section of the Erie canal in repair, was not liable to an individual who had sustained damages in consequence of his neglecting to perform that duty.

The principle, *respondet superior*, does not apply to such a case, and affords no shield to the contractor, who is exercising an independent employment under a contract, and is in no sense a servant or agent of any one.

Neither the contracting board, nor the canal commissioners, can be held to incur any liability for accidents, or injuries to third persons, by reason of the failure of the contractors to perform their contracts.

Nor is the sovereign, or state, liable in such a case; because negligence in the selection of an agent or servant cannot be imputed against the state.

APPÉAL from an order made at a special term, overruling a demurrer to the complaint. The plaintiffs, in their complaint, alleged that on or about the 7th day of September, 1859, one Myron H. Mills entered into a contract under seal with the people of the state of New York, which contract was duly executed on the part of said people, under the hands and seals of the then canal commissioners, state engineer and surveyor, and auditor of the state of New York, and said contract was duly made in pursuance and by virtue of the laws of the state of New York relating to the canals of said state, of which contract the following is a copy, viz: "For keeping in repair superintendent section No. 11, Erie canal. Articles of agreement, made and concluded this six-

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teenth day of September, in the year eighteen hundred and fifty-nine, between Myron H. Mills, of the city of Rochester, county of Monroe, of the first part, and the people of the state of New York of the second part, whereby it is covenanted and agreed as follows: The said party of the first part does hereby covenant and agree that he will, for the term of three years from the first day of October next, furnish and keep on hand all the materials necessary, which shall be of sound and good quality, and perform all the labor necessary to keep in good repair, and well bottomed out to its original base or bottom line and width of prism, free from obstructions, and in good navigable condition, at all times during the season of navigation, and to break the ice in the canal to the extent that the canal commissioner or engineer in charge may require, to facilitate the passage of boats, toward the close of navigation, all that portion of the Erie canal known and distinguished as superintendent or repair section number eleven, extending from the east line of Monroe county to the west end of construction section number two hundred and eighty-four, in the village of Brockport, including its banks and tow-path, walls, pavements, docking, locks, weigh-locks, aqueducts, dams, bridges, basins, side-cuts, guard-banks, feeders, reservoirs, culverts, waste-weirs, creek channels, ditches, lock and watch-houses, and every other structure or thing, of whatever name or designation, connected therewith; and to construct or reconstruct, as in the opinion of the canal commissioner in charge the same shall become necessary, and on such plan as the said commissioner shall direct, any of the bridges or other structures which may fail or require reconstruction during the period of this contract; but when the same shall be more expensive than it would be if constructed according to the old plan, the party of the first part is to be paid the difference, but which shall only be paid upon the certificate of the division engineer of the western division, that he has examined the location, and made the estimate by which the said difference was

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ascertained, and that it is a proper and reasonable charge for such extra cost. In all cases of breaches in the banks, or failure of any of the structures on the said section, the party of the first part agrees to give immediate notice to the commissioner in charge, and the auditor of the canal department, and to employ such force upon its repair or reconstruction as will insure its completion at the earliest possible moment; and all damages that may accrue from entering upon lands to obtain materials for such repairs, or reconstruction, shall be fixed by the appraisal of the canal appraisers, or settled by the commissioner, as now provided by law, and deducted from the first monthly payment after such appraisal, payable to the said party of the first part, as hereinafter provided for, unless the said party of the first part shall previously adjust the said damages by an amicable settlement with the claimants. And it is further mutually agreed between the parties hereto, that in case the actual expense of repairing any breach which may occur upon any part of the canal, side-cuts or feeders, embraced in this contract, or any structure connected therewith, shall exceed the sum of five thousand dollars, such excess shall be paid by the parties of the second part. And the said party of the first part agrees to have the locks, waste-weirs and feeders on the said section well and properly attended, the locks to be attended night and day through the season of navigation, and to have good and sufficient lights at the locks at all times during the night, and to keep or cause to be kept a regular account of the lockages at such locks as the auditor shall designate, to be sworn to by the lock-tender, and to be sent to the auditor, on the first day of every month. And the said party of the first part further agrees to give prompt and sufficient assistance to boats or floats obstructed by bars, or low waters, or 'jams' of boats in the canal, or any navigable feeder embraced in this contract, and to assist the unloading of sunken boats, without charge, in the same manner as the superintendent is required to do under section No. 26 of the canal regulations

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of 1858. * * * It is agreed, further, between the parties in this contract, that the party of the first part may prosecute offenders for violations of the canal laws and regulations, committed upon that portion of the canal or other works embraced in this contract, or upon any structure connected therewith, and recover the same penalties imposed by law or any existing resolution of the canal board, as might have been recovered for like offenses if prosecuted by a canal superintendent; and the amount of such penalties recovered shall be accounted for to the state by deduction from monthly payments to said party of the first part, but said party of the first part may sue in his own name, and recover to his own use the actual damages he may have sustained in consequence of such trespass. * * * * And it is further agreed, that the work embraced in this contract shall be performed under the immediate direction of the canal commissioner in charge, and at such times and seasons, at such places in the work, and in such manner as the aforesaid commissioner or the engineer in charge shall direct; and particular reference shall at all times be had to the navigation of the Erie canal, the safety, protection and security of the banks and of the mechanical structures in any manner connected with the work herein contracted for; and all precautionary measures that may be deemed necessary for the security and protection of the aforesaid section of the canal, and the navigation of the same, shall be carried into effect by the said party of the first part, and the levels filled up and drawn off, as shall be directed by the commissioner or engineer aforesaid. * * * * And the said party of the first part hereby further promises and agrees to perform the several stipulations of this contract by himself and workmen under his immediate superintendence, and not by a sub-contract or sub-contractor. And it is further agreed, that if at any time any overseer or workman employed by said party of the first part shall be declared to be unfaithful or incompetent by the canal commissioner or resident engineer having charge of said work on that part of the canal

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embraced in this contract, the party of the first part, on notice of such declaration, shall forthwith dismiss such person, and shall no longer employ him on any part of the work. And it is further mutually understood and agreed, that this contract, or any interest in the same, shall not be assignable to any person or persons whomsoever, without the written consent or approval of the canal commissioners; and in case of assignment with such approval, the same shall not be effectual for any purpose whatever, without the written consent to such assignment of the sureties furnished for the performance of the contract, or such assignee furnishing such new and satisfactory security as may be required in conformity with the provisions of chap. 329 of the laws of 1854, and the provisions of the act entitled 'An act to secure the payment of wages to laborers employed on the canals and other public works of this state,' passed April 10, 1850. And it is hereby further understood and agreed between the parties to this contract, that in case of delays arising in the progress of the work, either from neglect or inability on the part of the party of the first part, which may retard the opening of the Erie canal, or in any way embarrass or interfere with its navigation, said canal commissioner may direct the said resident engineer to employ a sufficient force, and purchase the necessary materials to prosecute the work, or such portion of it as in the opinion of the said commissioner may be necessary to secure navigation, and keep the said section in proper repair; and all expenses incurred in the performance of such work shall be paid for by the said canal commissioner, and the amount shall be charged to the account of the aforesaid party of the first part; and deducted from the payments hereby agreed to be paid to said party of the first part. And it is further agreed, that the said party of the first part shall receive into and pass through that portion of the canal, or feeders, included in this contract, at all times, all and so much water as may be necessary or required for the use or navigation of any part or parts of the canal de-

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pendent upon or connected with the said portion thereof included in this contract, and in such manner as shall be directed by the canal commissioner or engineer in charge. In case the state, division or resident engineer shall certify to the said canal commissioner, or to the contracting board, that the repairs upon that portion of the canals embraced in this contract are not promptly and properly made, or that unsuitable materials are used, or that the locks are not well and properly attended, or the navigation is not kept free from jams from boats, timber or other obstructions, or the feeders to said canal are neglected, so that there is not sufficient water for navigation; for all or either of the above causes of neglect by said party of the first part, the canal commissioner may withhold said monthly drafts from the party of the first part, and the contracting board may declare the said contract abandoned, and thereupon the canal commissioner shall take charge of the work embraced in this contract, and make the repairs necessary to maintain navigation, in the manner provided for by chap. 105, laws of 1857, in cases where said repairs are not performed by contract, until the contracting board shall re-let said repairs. In consideration of the faithful performance of this contract by the said party of the first part, the party of the second part agrees to pay therefor, out of any money in the treasury applicable to canal repairs, by a draft on the auditor of the canal department, the sum of eight thousand two hundred and eighty dollars, (\$8280,) payable in equal monthly payments, commencing with the first day of November, 1859, deducting therefrom fifteen per cent, to be held to the end of each year, as security for the faithful performance of this contract, which fifteen per cent for the previous year shall be paid at the expiration of the third month of each succeeding year thereafter, in case the provisions of such contract have been fully complied with."

The plaintiffs alleged that after the execution and delivery of said contract, the said canal commissioners, as they were authorized to do by the laws of the state of New York afore-

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said, made, executed and delivered to said Myron H. Mills a writing under their hands as such commissioners, dated September 23, 1859, whereby they, as such commissioners, authorized the said Myron H. Mills to sell and assign said contract to the defendant; and the said Myron H. Mills did on the same day, by an instrument under his hand and seal, sell, assign and set over to said defendant the said contract, and all of his right and title in and to the same, and all benefit to be derived therefrom, and subject to all the conditions and requirements contained in said contract, and which might arise and accrue by reason thereof. And that the said defendant on his part, in consideration of said assignment, on or about the 26th day of September, 1859, executed and delivered to the people of the state of New York a bond, dated that day, in the penal sum of \$6000, with two sureties, conditioned that if the said assignment of said contract should be accepted and approved by the canal commissioners, he, the said defendant, would, in pursuance of said contract, at the time therein mentioned, enter upon the execution thereof, and fully and faithfully perform the same according to the stipulations contained therein. That said bond was afterwards duly approved by the canal commissioners, and the assignment was also accepted and approved by them. That said canal commissioners were authorized to permit said assignment, and were authorized and required to take and approve the bond aforesaid by the laws of the state of New York. That the defendant thereupon succeeded to and became vested with all the rights and subject to all the liabilities of said Myron H. Mills under the contract aforesaid. And that at the time for that purpose mentioned in said contract, the defendant duly entered upon and undertook the execution thereof, and has ever since continued to undertake the execution of said contract, and said contract still remains in full force and effect. The plaintiffs then alleged that the defendant had failed to perform said contract, by neglecting to keep the tow-path of the Erie canal, in and through that

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part of section eleven thereof, mentioned in said contract, in repair, and by negligently and wrongfully, in violation of said contract, suffering and permitting the tow-path of the section aforesaid to become and remain uneven and greatly out of repair during the season of canal navigation of the year 1860, and by suffering to be made and continue during the time aforesaid, in the tow-path aforesaid, large and deep holes, contrary to the condition of said contract. That the said Erie canal is a public highway for the transportation of property and persons by water, and the same is the property of the people of the state of New York. And the tow-path is a part of said canal, constructed and used for the passage of horses and other animals which are necessarily employed in towing canal boats or other craft upon and along the said canal, and upon and along section eleven aforesaid; and it became and was the duty of the defendant, under the contract aforesaid, to make and keep the tow-path of said canal, through the said section eleven, in such repair that horses and other animals lawfully engaged in towing canal boats or other craft, or for any purpose lawfully passing along said tow-path, might pass upon, over and along the same, conveniently and safely. That on or about the 17th day of October, 1860, and during the navigation season of that year, two horses, the property of the plaintiffs, were lawfully passing upon, over and along the tow-path of section number eleven of the Erie canal, mentioned in said contract, in the night time, and were lawfully employed by the plaintiffs to tow, and were then towing through the section aforesaid, a canal boat of the plaintiffs, their property, and lawfully passing through said canal, and while said horses were carefully, properly and lawfully passing over and upon the tow-path of the section aforesaid, employed at the work of towing along said canal in the section aforesaid, the said horses, in consequence of and for the sole reason that the tow-path of said canal in said section eleven, mentioned in said contract, was then in the bad condition and out of repair, as hereinbefore stated, and was then unsafe

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and unfit for the passage of horses employed as aforesaid, fell or were precipitated into the canal in said section eleven, and one of said horses was drowned and wholly lost to the plaintiffs, and the other of said horses, and the harness upon said horses used in the business of towing said boat, were greatly injured. That said horse so drowned and lost was of the value of \$100, and the damage done to the other of said horses, and to said harness, was the further sum of \$25. That the loss of said horse and the damages to the other, and the harness aforesaid, was wholly occasioned by the neglect of the defendant to make and maintain said tow-path of said section of the canal in that repair and condition in which he was required to keep the same, in and by the terms of said contract, and that said loss and damage was not in any respect occasioned by want of care and diligence on the part of the plaintiffs or their servants. That said tow-path was out of repair, as hereinbefore set forth, for a long time prior to the time said horses fell into the canal as above stated, and that the defendant well knew the same.

Wherefore the plaintiffs demanded judgment against the defendant for one hundred and twenty-five dollars and interest, besides costs.

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, with leave to the defendant to answer on payment of costs. The defendant thereupon appealed.

Samuel J. Crooks, for the appellant.

Edward Harris, for the respondents.

By the Court, JOHNSON, J. The principle, *respondent superior*, does not apply to a case like this, and affords no shield to the defendant. This is fully settled in the cases of *Blake v. Ferris*, (1 Seld. 48;) *Pack v. The Mayor &c. of*

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New York, (4 *id.* 222;) and *Kelly v. Same*, (1 *Kern.* 432.) He is in no sense an agent or servant of any one, but is exercising an independent employment under an express and specific contract. This contract the statute authorizes the contracting board to make; which board is composed of the canal commissioners, the auditor of the canal department, and the state surveyor and engineer. It is part of the system adopted by the state for maintaining the public works, and keeping its property in repair. Formerly this was done through the machinery or agency of superintendents of repairs, who were public officers, charged by statute with the duty of doing, or causing to be done, under the general supervision of the canal commissioners, just what the defendant has undertaken to do by his contract.

Neither the contracting board, nor the canal commissioners, can be held to incur any liability for accidents or injuries to third persons, by reason of the failure of these contractors to perform their contracts. The servants of the sovereign thus contracting in their official capacity were never, in any way, liable upon such contracts, made within the scope of their authority, or for the wrongful acts or omissions of the persons with whom they contracted. The principle of *respondeat superior* never applied in such a case. (*Broom's Legal Maxims*, 390, and cases there cited.) Nor is the sovereign, or state, liable in such a case; because negligence in the selection of an agent or servant cannot be imputed against the state.

The question then arises, whether the defendant can be held liable for the alleged injury, occasioned by his neglect or refusal to make the repairs, and to keep the tow-path of the canal in repair, according to his contract. He is not a public officer, but a mere individual contractor, whose obligations and duties all spring from the provisions of his contract, instead of the requirements of the statute or the common law.

There is no doubt that a superintendent of repairs, charged with the same duty, and under the same obligation by virtue

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of his office, would be held liable in a case like this. (*Shepherd v. Lincoln*, 17 *Wend.* 250. *Adsit v. Brady*, 4 *Hill*, 630.) But this is upon the ground of the legal duty he owed to the public, as a public officer. There is of course no privity of contract between the plaintiffs and the defendant, on which the liability of the latter to the former can be made to rest. And unless the defendant under his contract can be held to owe a legal duty to the public, to perform it, I do not see any ground upon which this action can be maintained.

I think no case can be found, nor am I aware of any principle of law, which makes a mere contractor, though upon a public work, who is not a public officer, liable to third persons for damages occasioned by the non-performance of the obligations of his contract. There is a material and plain distinction between obligations or duties imposed by law, as upon public officers, and those created by contract merely. In regard to the former, they are created for the benefit of, and are due to, every one who has occasion for, or an interest in, their performance; and hence any one who sustains an injury which is personal to himself, and not common to all others, by means of their non-performance, or their improper performance, may maintain an action against him who owes the duty, to recover the damages thus sustained. But as to the latter, they rest between the contracting parties alone, and none but parties or privies can enforce them, or maintain an action to recover damages for a neglect or refusal to perform them. It is urged on behalf of the plaintiffs that this contract being one in regard to a public work, which is for certain purposes a public highway, and for keeping it, as such highway, in repair, is in the nature of a public obligation or duty, owing to every one lawfully using such highway; and that unless they can maintain this action they are remediless, as they have no right of action against the canal commissioners, or the contracting board, or the state. It may be that the plaintiffs are without remedy, if

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this action fails; but that consequence would furnish us with no authority to change a well established rule of law.

The character of the work contracted to be done, can never be held to change the character of the obligation of the contracting party. It is still private and personal, and not in any legal sense public and official. I think no one would contend that the defendant could be indicted for neglecting to keep the canal, or the towing path, in repair, according to his contract.

The precise question here presented was decided in the case of *Minard v. Mead*, not reported, (a) in accordance with the foregoing views, by our brethren in the eighth district. A very able and conclusive opinion by GROVER, J., which was concurred in by all the judges, has been furnished us by the learned justice who delivered it. The conclusions arrived at in that case we fully approve and adopt.

It follows, therefore, that the demurrer was well taken, and was erroneously overruled at the special term.

The defendant must have judgment on the demurrer.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Welles and J. C. Smith*, Justices.]

(a) The following is the case referred to:

MINARD vs. MEAD.

By the Court, GROVER, J. The question involved in this case is one of much public importance, although the amount between the parties is inconsiderable. By chapter 327 of laws of 1854, the canal commissioners were required to let by contract to the lowest bidder the repairs upon three superintendents' sections upon the Erie canal. The contractor is required to give adequate security for the performance of his contract. Further to secure such performance, fifteen per cent is to be retained from the monthly payments thereon until the expiration of the third month of the ensuing year, and provision is also made for declaring the contract abandoned, by the canal board, in case of failure to perform by the contractor; in which event the canal commissioner is to take charge of such sections, and make the repairs necessary to maintain navigation, in the manner required by law. By chapter 554 of laws of 1855, the canal commissioners are authorized to let by contract, under the provisions of the preceding act, the repairs upon any completed superintendent's section on any of the canals of the state, under the

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approval and directions of the canal board. The authorities establish the principle that when a franchise is conferred by the sovereign power upon a corporation or individual, in consideration of which such corporation or individual is required to perform certain duties, such corporation or individual is liable, in a civil action, to a party sustaining an injury peculiar to himself, from neglect of performance. The cases establishing this principle are cited and reviewed in *Conrad v. The Trustees of Ithaca*, (16 N. Y. Rep. 158;) and in *Weet v. The Trustees of Brockport*, (*Reporter's note to case, supra.*) It is argued by the plaintiff's counsel that a contractor for repairs upon the canal, pursuant to the statute, is also liable to an action at the suit of a party sustaining an injury peculiar to himself, in consequence of the neglect of such contractor to perform his contract. The absence of any precedent for such action is not conclusive, if the case comes fairly within the principle of adjudicated cases. If the action is sustained, it becomes important to determine upon what it is founded. If upon contract, the defendant cannot be imprisoned upon the judgment; if, upon a breach of duty enjoined by law, he can be so imprisoned. I am not aware of any cases holding that a contract entered into by an individual with the public, creates any higher legal duty of performance than if entered into with an individual; or that the breach is attended by any other consequence, unless such consequence is especially provided by statute. When the sovereign power enters into a contract, simply, without by law providing an additional security to enforce performance, resort can only be had, in case of breach, to the remedies prescribed by law available to other parties in like cases. Should it be held that such contracts create a duty analogous in its character to a duty enjoined by law upon corporations and individuals, the consideration for the performance of which was the grant of a franchise, it would follow that the breach of such contract could be punished by indictment. Such a proposition, I think, no one will attempt to maintain. Among the great number of misdemeanors existing at common law or created by statute, no mention is made of a failure to perform a contract with the public or sovereign power. The simple non-performance of a contract entered into in good faith with the public or any other party, was never the subject of criminal prosecution. In all cases where a duty of a public nature is positively enjoined by law upon a corporation or individual, failure to perform such duty is a misdemeanor. It follows, then, that this action cannot be maintained upon the ground of a failure to perform a public duty enjoined by law. The defendant has only been guilty of a breach of contract, and his person cannot be imprisoned upon any judgment recovered against him for such breach. Can this action be maintained upon the contract? The plaintiff is not a party thereto, and the general rule certainly is, that actions upon contracts can only be maintained by the parties and their representatives, or, under the code, their assignees. It has never been the rule that more than one action could be maintained for a single breach of a contract. In this case an action can be maintained by the canal commissioners against the defendant and his bail, and the state was legally liable to the

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plaintiff for the loss of his horse in consequence of the failure to repair the towing path. I cannot see why they might not recover, therefore; such want of repair being the direct and proximate cause of the loss. At all events the action could be maintained, and a recovery had for such damages as were sustained by the state consequent upon the defendant's breach. I have not been able to find any case which, upon a careful analysis, countenances the idea that such a contract enures to the benefit of the entire community, thus enabling any one sustaining a peculiar injury to sustain an action for the breach. Yet that is precisely what is claimed by the plaintiff in this case. The position is, that any one entering into a contract with the public for the performance of any particular thing for a pecuniary compensation, becomes not only obligated to the public but to every member of community, and liable to a civil action, not only at the suit of the public, but of every individual sustaining a peculiar loss from a breach. This position is sought to be maintained by the reasoning of Judge Selden in *Weet v. Trustees of Brockport*. I have carefully examined the opinion of the learned judge in that case, and am unable to discover any such doctrine. True, the reasons assigned for the decision of some of the cases discussed may appear to sustain it, but when taken in connection with the cases themselves, entirely fail, I think, to establish it. In *Henley v. The Mayor and Burgesses of Lyme Regis*, (5 Bing. 91,) it was held that an action lay against the borough of Lyme, to recover damages sustained from neglect to repair certain sea-banks. In that case it was said by Park, J. in giving the opinion of the court, that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. This the learned judge supposes, in *Weet v. Trustees of Brockport*, is not quite correct, for the reason that, were it so, it would include public officers neglecting to perform official duties. He cites numerous cases showing that the latter do not fall within that principle. He then endeavors to show that the true reason of the adjudication was the consideration received by the borough for the obligation imposed. With deference, I submit the consideration had nothing to do with the question. Had the borough received no grant of land from the crown, or other valuable consideration, for performing the duty, yet had that duty been positively enjoined by law, the defendant would have been equally liable to an indictment or action, for a failure to perform.

I understand the judge in *Henley v. Mayor &c. of Lyme Regis*, (*supra*), as speaking not of officers but of corporations and individuals, upon whom duties of a public nature were imposed by law, as liable to the action in all cases when liable to an indictment, that is, when a legal duty of a public nature had been violated. The error, I think, consists in placing the decision upon the ground of an agreement, for a consideration, instead of a duty imposed by law. Officers other than those who perform duties for individuals for a compensation received from them, would not fall within the principle; not because they may be placed in this position against their will, or receive no compensation for their services, but for reasons of public policy, which requires that the per-

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formance of their duties should be enforced by the public authority, and that they should not be harassed by a multiplicity of actions by individuals. With deference I think such are the grounds of their exemption, (if exempt, as to which I give no opinion.) The whole class of cases holding municipal corporations liable to individuals for a failure to perform duties enjoined by law, depend upon the same principle. The legislature, designing to promote the welfare of a particular locality, incorporate the inhabitants, and confer upon such corporation certain franchises and impose certain duties. The idea of construing this exercise of sovereign power of legislation into a contract by which the corporation so created promises, in consideration of the franchises, to perform the duties, strikes me as more ingenious than substantial. It is true that in our government such corporations are not created, as a general rule, and duties imposed without the consent of the people immediately interested, but there is nothing in the way of the legislature so doing. I apprehend that it would scarcely be regarded as a defense to an indictment or action, that the charter prescribing the duty had been imposed upon the people against their unanimous wish; yet in such a case the law could hardly imply a promise to perform a duty. The same principle applies to an individual to whom the franchise of a ferry, toll-bridge, or any other, is granted. The law, in all such cases, imposes a duty commensurate with the grant, and the grantee is liable to an individual for a special injury occasioned by non-performance. It appears to me that this principle, and this alone, lies at the foundation of all the cases. Perhaps the case of *Fielding v. Fay* (Cv. Ellis. 569) may be regarded as an exception. In that case it was held that a custom requiring a parson to keep a bull and a boar for the use of the inhabitants of the parish was a good custom, and an action would lie against the parson by a parishioner for neglecting so to do. In another report of the case it is said that the action lieth not, unless the plaintiff show a prescription for it and a consideration for such prescription, as that the parson had an increase of tithes. Now of this case it may be said that a prescription presupposes a grant or contract having a lawful origin, and that should any one contract with the inhabitants of a district to do any thing for their benefit severally in consideration of a several payment by them of a certain tithe or any thing else, I can see no difficulty in such inhabitants severally maintaining an action against him, and if the contract was with the inhabitants all jointly, no difficulty except as to the joinder of parties. Yet I think this does not at all tend to show that one who had contracted with the commissioners of highways to repair, and neglected to do any thing about it, would be liable to a party losing a horse for want of such repair; or that an army contractor who for a certain sum had agreed with the government to deliver flour at a fixed time and place would, in case of failure to perform, be liable to a soldier for an injury sustained from want of bread. Once adopt the principle contended for by the plaintiff and there is no limit to the liability of a contractor with the public. Better adhere to the ancient landmarks, and sustain the action only where the duty is imposed by law positive in its character; and if this includes public

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officers, subject them to the liability, unless exempt therefrom on the ground of public policy, or by a course of judicial decisions that cannot be disturbed. In none of the cases that have fallen under my notice, where an action has been maintained by an individual, was there any contract with the public upon which an action could be maintained by the public. Upon reason and authority I think this action cannot be maintained, and that the judgment of nonsuit should be affirmed.

HOTT, P. J. dissented.

[ERIE GENERAL TERM, September 8, 1860. *Hoyt, Marvin, Davis and Grover*, Justices.]

 DENNIS O. FARRELL vs. WILLIAM HILDRETH.

In order to bring the interest of a mortgagor of chattels within the power of an execution, there must be an absolute right of possession for a certain and definite period, at the time the levy is made.

If the time is uncertain or contingent, it cannot be certain or absolute; and if it be contingent and liable to be defeated at any moment, it is not for a definite period.

A provision, in a mortgage, allowing the mortgagee, in case he shall at any time deem himself insecure or unsafe, to take possession of the property and sell it, previous to the time fixed for the payment of the debt, destroys the mortgagor's implied right to remain in possession a moment, provided the mortgagee shall deem himself insecure, and leaves him a mere tenant at sufferance. The nature of his interest is thereby determined to be uncertain and contingent.

And if a sheriff, in such a case, with notice of the mortgage, and after demand of the property by the mortgagee, proceeds to sell the same, on execution against the mortgagor, he renders himself liable to the mortgagee.

THIS was an appeal from a judgment of the county court of Ontario county, reversing the judgment of a justice of the peace. The action was brought to recover for the wrongful conversion of a wagon and a yearling heifer, which property the plaintiff claimed by virtue of a chattel mortgage executed to him by John Farrell, the owner of the property. The mortgage was executed January 23d, 1860, and was filed in the town clerk's office on the 24th day of the same

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month. It was given to secure the payment of \$50 and interest in one year from the date. It contained the following clause: "And in case the said Dennis O. Farrell shall at any time deem himself insecure or unsafe, it shall be lawful for him to take possession of such property and to sell the same at public or private sale, previous to the time above mentioned for the payment of said debt," &c. The answer was a general denial, and it also alleged that the mortgage was fraudulent and void as to judgment creditors. The defendant, as sheriff of Ontario county, by one of his deputies, levied upon the property on the 9th day of April, 1860, by virtue of an execution issued upon a judgment recovered by David Pomeroy against John Farrell, the mortgagor, previous to the execution of the chattel mortgage. The plaintiff proved a demand of the property, of the sheriff, which was refused, and the plaintiff forbade the sale. The sheriff sold the property, on the execution. The cause was tried, in the justice's court, before a jury; who found a verdict in favor of the plaintiff for \$46 damages and costs, and the justice entered judgment for the plaintiff thereon.

E. W. Gardner, for the appellant.

E. M. Mason, for the respondent.

By the Court, WELLES, J. The only question in this case requiring particular consideration is whether, at the time of the levy or the demand by the plaintiff of and upon the property in question, John Farrell, the judgment debtor and mortgagor, had an interest in the property, liable to be levied upon and sold on execution against him. The mortgage was given on the 23d of January, 1860, and filed in the proper town clerk's office the next day, January 24th. It contained the usual insecurity clause in chattel mortgages. The levy by virtue of the execution in favor of Pomeroy was on a sub-

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sequent day, but before the day appointed for the payment of the money secured by the mortgage.

It is well settled that the interest of a mortgagor, having a right to redeem, and a right to the possession of the mortgaged property for a definite period, may be sold on execution. (*Mattison v. Baucus*, 1 *Comst.* 295, and authorities there cited.) It is equally well settled that where the mortgagor has retained no other interest in the property than an equity of redemption, such interest is not the subject of levy and sale. (*Mattison v. Baucus*, *supra.*) A great many other cases, to the same effect, might be cited. In order to bring the interest of the mortgagor within the power of an execution, there must be an absolute right of possession for a certain and definite period, at the time the levy is made. If the time is uncertain or contingent, it cannot be certain or absolute; and if it be contingent and liable to be defeated at any moment of time, as in the present case, it is not for a definite period. Who would enter into competition at the sale when he knew that if he purchased, his title might be defeated the next moment, by the claim of the mortgagee under the insecurity clause. The nature and extent of the interest remaining in the mortgagor immediately after the execution and delivery of the mortgage, is the test, unless that interest has changed and become enlarged afterwards and before the levy.

The mortgage conveyed all the mortgagor's title and interest in the property to the mortgagee, subject to be defeated by payment by the law day. By the express provision in the mortgage securing to the mortgagee, in case of non-payment when the money became due, the right to take possession and sell, &c., an agreement was implied on the part of the mortgagee to allow the mortgagor to remain in possession until the money became due, (*Hall v. Samson*, 19 *How. Pr. Rep.* 481;) except for the subsequent provision in the mortgage, allowing the mortgagee to enter and sell at any time when he felt insecure, &c. That clause destroyed the mort-

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gagor's right to remain in possession a moment, provided the mortgagee deemed himself insecure, and left him a mere tenant at sufferance. The nature of his interest was thereby determined to be uncertain and contingent; and, I had supposed, determined the question against the right of an execution creditor to levy and sell. But if a demand by the mortgagee was necessary, as is held in the case last cited, there was evidence of one in this case, at least sufficient to submit to the jury. There was abundant ground for a feeling of insecurity on the part of the mortgagee; the sale was forbidden and the property demanded; and all the questions were submitted to the jury. And the return does not show that any objection was raised or point made on the trial, on the question of the form or sufficiency of the demand. The jury, under the evidence, would have been well warranted in finding that the mortgagee felt himself insecure and unsafe, and therefore made the demand and forbade the sale. The defendant's deputy, notwithstanding, and after direct personal notice of the mortgage, proceeded to sell the property.

The judgment of the county court should be reversed, and that of the justice affirmed.

[MONROE GENERAL TERM, September 1, 1862. Johnson, J. C. Smith and Waller, Justices.]

ISAAC BUTTS vs. WILLIAM WOOD, DANIEL WOOD, JOHN CORNWALL and THE ROCHESTER AND WEBSTER PLANK ROAD COMPANY.

The relation between directors of a corporation and its stockholders, is that of trustee and *cestuis que trust*. And if the directors pay over the funds in their hands or in the treasury to an individual upon a pretended claim, which they know, or must be presumed to know, is wholly unfounded in law, it is a breach of trust on their part.

Where W., who was secretary and treasurer of a corporation, and also one of the directors, presented a claim to the board of directors for compensation

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for his services as secretary, which claim was allowed, and ordered to be paid, by the vote of the three directors present, W. himself being one of them, his father another, and a relative the third; *Held* that the transaction challenged the most jealous and severe scrutiny, even if there was legal color for the claim. But that, there being in fact no legal claim, the court was in duty bound to pronounce the disposition of the funds of the company, thus made, fraudulent and void, as against the other stockholders.

Held, also, that a stockholder of the corporation could maintain an action in his own behalf and in behalf of the other stockholders, against the three directors constituting a majority of the board, by whom the resolution was passed, to set aside the transaction, as an abuse of trust, and for the repayment of the money.

APPEAL from a judgment entered upon the report of a referee. The action was brought, among other things, to set aside the action of the defendants, as directors of the Rochester and Webster Plank Road Company, in voting to to the defendant Daniel Wood compensation for services as secretary of the company. The plaintiff sued in behalf of himself and all other stockholders in the company who should come in and make themselves parties to the action. The complaint, among other things, alleged the incorporation of the company under and by virtue of the laws of this state, for the construction and maintenance of a plank road from the city of Rochester to and into the town of Webster, both in the county of Monroe, with a capital stock of \$24,000, divided into shares of \$100 each; that said corporation was created on or about the 26th day of December, 1849; that the road contemplated to be constructed by said corporation was shortly thereafter constructed, and ever since has been maintained. That the affairs of said corporation are administered by five directors or trustees, chosen by the stockholders annually, one of whom is chosen president and another secretary and treasurer of said corporation. That the defendant William Wood is now and has been one of the directors of said corporation from its original organization, except one year; that the defendant Daniel Wood became a director of said corporation on the 12th day of September, 1854, and ever since has been, and that said Daniel Wood became the

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secretary and treasurer of said corporation on the 26th day of September, 1854, and ever since has been; that the defendant John Cornwall became a director of said corporation on the 28th day of December, 1858, and ever since has been. That the defendant William Wood, since the year 1855, has been the superintendent of said plank road company. That the salary of the secretary and treasurer, Isaac R. Elwood, Esq. was fixed at \$50 per year, and one per cent upon the amount of moneys received by said treasurer, and that the same continued to be the compensation and salary of said secretary and treasurer, until altered as hereinafter stated. That the said Daniel Wood urged as a reason why he should be elected to the office of secretary and treasurer, that he could afford to, and would, discharge the duties of said office at a less rate of compensation than that theretofore paid, so that thereby there would be a saving to said corporation. That on the 17th day of December, 1855, a resolution was adopted by the directors of said corporation, that the secretary and treasurer be allowed as his compensation the sum of one per cent on the receipts of said corporation, and fifty cents per week; which said resolution was recorded, however, in the books of minutes of said corporation, by said Daniel Wood, then secretary, so that such allowance is made to the treasurer of said corporation; but that, nevertheless, the said Daniel Wood, who has held the office of secretary and treasurer during all the time since such resolution was adopted, has claimed and received from said corporation only in accordance with said resolution, as above stated, as his compensation, until and except as hereinafter stated. That the duties of secretary and treasurer during the time that said office has been held by said defendant Daniel Wood, are far less laborious than during the term that the said offices were held by said Elwood. That on the 5th day of July, 1857, at a special meeting of the trustees of said corporation, attended only by the said defendants Daniel Wood, William Wood and John Cornwall, the three directors aforesaid, voted to pay to said

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defendant Daniel Wood, out of the funds of said corporation, the sum of \$933.33, nominally as compensation for his services as secretary of said company; and that said defendant Daniel Wood claims to hold and retain the same out of the funds of said corporation. That said directors also, at the same meeting, adopted a resolution fixing the salary of the secretary and treasurer of said corporation at the sum of \$300 per year. That the defendant Daniel Wood had not rendered any service to or for said corporation, as secretary and treasurer or otherwise, which entitled him to ask, demand or receive, or authorized or justified the said directors in voting the payment of the said sum of \$933.33; but that such vote was contrary to the duties which the said directors owed to the stockholders of such corporation, and in fraud of their rights. That the sum of \$300, so voted to be paid to said defendant Daniel Wood, is grossly disproportioned to the value of the services rendered by said defendant Wood as secretary and treasurer of said corporation; and that the same was voted by said directors in fraud of the rights of the stockholders of said corporation. That the defendant Daniel Wood concurred with the defendants William Wood and John Cornwall in both the votes aforesaid. That at the time when the duties of the superintendent of said plank road were the most onerous, the salary of said superintendent was fixed for a while at the sum of \$480 per year, including horse hire; and that during a portion of the existence of said corporation, the salary of said superintendent has been fixed at as low a sum as \$24 per month; that the duties of said superintendent are now very light, requiring but a very small portion of the time of said superintendent; but that notwithstanding this, the defendants William and Daniel Wood and John Cornwall, at the meeting last aforesaid, resolved that the salary of said William Wood should be \$600 per year, from and after the first day of July, in the year 1859. That such sum is grossly disproportioned to the value of the services of said William Wood as superintendent, and greatly

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beyond that paid or allowed by other plank road corporations for similar services, and that the vote fixing the salary of said superintendent was in fraud of the rights of the stockholders of said corporation, and wholly unwarranted. That such vote was adopted by the concurrence of the defendants Daniel and William Wood and John Cornwall. That said Daniel Wood has paid to said William his salary at the rate of \$600 per year, since the time fixed in such resolution. That of the two hundred and forty shares of the capital stock of said corporation, the defendant William Wood owns sixty-two, the defendant Daniel Wood eighty-two, and that four shares stand upon the books of said corporation in the name of the defendant Cornwall; but that the transfer of said shares to Cornwall was either made or procured to be made by said defendants William or Daniel Wood, or both of them, in order that he might be a director in said corporation; that said William and Daniel are father and son, and said Cornwall a relative of said Woods, of some kind, and that they uniformly act in concert in the management of the affairs of said corporation. That by means of the actings and doings hereinbefore stated, the plaintiff and the other stockholders of said corporation have been deprived of gain which they ought to have received upon their stock, and that the value of the same has been injured and impaired, and that they have not been, and are not, able to procure any redress by the action of the directors of said corporation. The plaintiff alleged that he was the owner of sixty-eight shares of the capital stock of said corporation. The prayer was that the defendants William and Daniel Wood, and John Cornwall, might be removed from their respective offices as directors, secretary and treasurer and superintendent of said corporation; that they might be enjoined and restrained from further interfering with the management of the affairs of said corporation; that a receiver of such corporation might be appointed; that the defendants Woods, and each of them, might be required to account for all money or property of

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said corporation, which had come to their or either of their hands, and pay over the same, or the value thereof, to such receiver, for the benefit of the stockholders of such corporation; that the votes or resolutions directing the payment of said sum of \$933.33 to said Daniel Wood might be declared void, and said Daniel Wood adjudged to pay over the same to such receiver for the benefit of the stockholders; and that the votes or resolutions of the 5th of July, 1859, fixing the salary of said secretary and treasurer and said superintendent, might be declared void, and said Daniel and William Wood be adjudged to pay over all sums which they or either of them have received, under and by virtue of the same, to such receiver, for the benefit of such shareholders, or for such other, or further, or different relief, &c.

The defendants, by their answer, denied most of the material allegations of the complaint. The action was referred to T. R. Strong, Esq. as referee, who found the following facts in connection with those admitted or appearing by the pleadings: In January, 1851, a resolution was passed by the directors of said plank road company, fixing the salary of the secretary and treasurer at fifty dollars a year, and one per cent on all sums received by him. Isaac R. Elwood was then secretary and treasurer of said company, and continued to hold the offices until October, 1854, when the defendant Daniel Wood was elected to both offices, and he has held them ever since. On the 17th of December, 1855, a resolution was passed by the directors of said company that the treasurer thereof be allowed one per cent on receipts by him, and fifty cents a week, for his services. There was no express or implied agreement between the company and the said Daniel Wood that the latter should be paid for services as secretary merely, from December, 1855, to July 1859; but, on the contrary, it was understood by those parties, upon the passage of the resolution of December, 1855, and for a considerable time afterwards, that no compensation was to be allowed for services as secretary or treasurer, beyond what

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was provided for in that resolution. Subsequently a claim of payment for services as secretary was made by Daniel Wood, but it is not proved that the company assented to or acted upon it until in July, 1859. On the 5th of July, 1859, at an adjourned meeting of the directors, Daniel Wood presented in writing a claim of \$933.33 for services as secretary of said company from 10th October, 1854, to 1st July, 1859, at \$200 a year, which was audited and allowed by the directors then present, and on the next day was paid to Daniel Wood. Only three of the five directors were present at that meeting, to wit, Daniel Wood, William Wood and John Cornwall, and these three directors audited and allowed the said claim. The company at that time was not indebted to the defendant Daniel Wood for services theretofore rendered as secretary.

The referee found the following conclusions of law :

1st. That the auditing, allowing and paying the aforesaid claim of Daniel Wood of \$933.33, for past services as secretary, was without authority on the part of the defendants Daniel Wood, William Wood and John Cornwall, contrary to their duty, and a breach of trust by them as directors, entitling the plaintiff to relief in this action.

2d. That the plaintiff is entitled to a judgment that the action of the directors of the 5th of July, 1859, allowing to Daniel Wood \$933.33 for past services, be declared void ; that the payment to him of that amount, under that resolution, be pronounced unauthorized and illegal ; that the defendants Daniel Wood, William Wood and John Cornwall be directed to pay to the said company, for the benefit of and distribution among the stockholders thereof, the said sum of \$933.33, so paid to the said Daniel Wood, with interest thereon from the 6th day of July, 1859, and that those defendants also pay to the plaintiff his costs of this action. Judgment was ordered accordingly. In case the said sum of \$933.33, with interest as aforesaid, should not be paid to the company within thirty days after notice of the entry of

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the judgment, the plaintiff to have leave to apply to the court for further directions and relief in respect thereto.

From the judgment entered upon this report the defendants appealed.

D. Wood, for the appellants.

W. F. Cogswell, for the respondent.

By the Court, JOHNSON, J. Upon a careful examination, of all the evidence in the case, I am satisfied that the finding of the referee "that it was understood by the parties upon the passage of the resolution of December 1855, and for a considerable time afterwards, that no compensation was to be allowed, for services as secretary and treasurer, beyond what was provided for in the resolution," is not without sufficient evidence in the case to sustain it. It follows, of course, from this, and the other facts found by the referee, that the company, at the time the resolution of the three directors was adopted, to pay the defendant Daniel Wood the sum of \$933.33, for the pretended service, was not indebted to him for such service. The question then arises, whether the matter can now be inquired into and an action maintained to redress a wrong of this description. The claim was presented at a regular meeting of the board of directors, at which a quorum was present, duly authorized to do any lawful act and to bind the company thereby, if within the scope of the powers of the board of directors. The claim thus presented was allowed, and paid, and it is claimed on the part of the defendants that that is a final end of the matter, and that the courts cannot now inquire into it, to correct it. This depends upon the question whether the transaction was in its character fraudulent, and in the nature of a breach of trust. If it was, the court has ample power to investigate the transaction, through all its bearings and relations, and redress the wrong. The relation in which these defendants stood, to the

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other stockholders, was that of trustees of the funds then in their hands, or in their treasury. And if they paid over these funds to a person upon a pretended claim, which they knew, or must be presumed to know, was wholly unfounded in law, it was clearly a breach of trust on their part. The relation between directors of a corporation, and its stockholders, is that of trustee and *cestuis que trust*. In this case, the defendants being directors, constituting a majority of the board, and necessary parties, it is just the case where the action may be maintained by a stockholder, in his own behalf, and in behalf of the other stockholders. (*Ang. & Ames on Corp.* 304, 305, 3d ed. *Robinson v. Smith*, 3 Paige, 222. *Scott v. Depeyster*, 1 Edw. Ch. 513. *Cumberland Coal Co. v. Sherman*, 30 Barb. 553. *Cross v. Sackett*, 16 How. Pr. Rep. 63.)

All the cases show that directors are not liable in such actions, unless bad faith can be imputed. This case, in principle, is quite analogous to that of a trustee selling trust property and becoming himself the purchaser in his individual right, which the law will adjudge fraudulent. Wayne, Jr., in *Mechond v. Girod*, (4 How. U. S. R. 553,) says, "the rule of equity is, in every code of jurisprudence, with which we are acquainted, that a purchase by a trustee, or agent, of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, *per interpositam personam*, carries fraud on the face of it." He further says: "The general rule stands upon the great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." The law recognizing the necessary presence of self-interest in the mind, and its general tendency, and the possibility of its preponderance, cannot allow the transaction to stand, but will set it aside without any other or further evidence of fraud. It provides against the danger in any case, by a general prohibition. It is upon this principle that the law excludes judges and jurors from sitting in cases in

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which they are parties, or have any interest, or stand in certain relations to either of the parties. It takes away jurisdiction from the judge in all such cases, and annuls his judgments. In one aspect, this case corresponds to that of a judge, or jury, sitting in his own case. The claimant was one of the directors, and without his vote in the board the claim could not have been allowed and settled. Another of the defendants was his father, and the other a relative. The transaction challenges the most jealous and severe scrutiny, even if there was legal color for the claim. But as there was in fact no legal claim, the court is in duty bound to pronounce this disposition of the funds of the company, thus made, fraudulent and void, as against the other stockholders. It is a clear abuse of trust, and should not be allowed to stand.

I am unable to perceive any valid objection to the judgment, in form or substance. It declares the action of the board fixing the compensation for the alleged services void, and the payment of the sum so fixed unauthorized and illegal, and decrees its repayment to the company for the benefit of, and distribution among, the stockholders thereof.

It does not decree distribution absolutely, but only declares the general purpose for which the repayment is to be made. Leave is therein given to apply to the court for further directions in that respect.

On the whole, I think there is no error, and that the judgment must be affirmed.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Welles and J. C. Smith*, Justices.]

MIRICK vs. BASHFORD.

After an agreement by a landlord to repair is broken, it becomes a chose in action in the tenant's favor, upon which he can maintain an action against the landlord.

If a grantee in fee of the landlord refuses to recognize any liability to repair, and the tenant, with notice of such refusal, attorns to him and pays him rent, the grantee is not liable on the landlord's contract to repair, if such contract was broken, and the landlord's liability for the breach was complete, before the grantee had acquired any legal estate in the premises.

If, after a purchaser from the landlord, has repudiated the landlord's covenant to repair, and refused to perform it, the tenant, avowing his intention to hold the lessor upon his covenant, continues in possession of the premises, attorning to the purchaser, by the payment of rent, without objection, as it becomes due, this will be held to be evidence, *prima facie*, at least, of a waiver by the tenant of any claim upon the purchaser, on the landlord's covenant to repair.

A PPEAL from a judgment entered on the report of a referee. The action was upon a lease, to recover a quarter's rent. Defense, a breach of a provision in the lease for repairs, &c. whereby the defendant has sustained damages, which he claims should be allowed him, by way of recoupment. The following facts were found by the referee: In the spring of 1858 Daniel Chapman purchased the warehouse and premises in the complaint mentioned, of Wells & Dewey. At that time the defendant occupied the premises, under a written lease from Wells & Dewey, for one year from May 1, 1858, with an additional ten days after the opening of canal navigation in the spring of 1859, in which to remove and ship his grain in store. He was to pay a rent of \$250, payable quarterly. The defendant attorned to Chapman, by the consent of his landlords, and the tenant occupied and paid the rent to Chapman, to May 1, 1859. In February or March, 1859, the defendant and Chapman made a new verbal agreement that the defendant should occupy the lot and warehouse a year from May 1, 1859, and ten days after the opening of canal navigation in the spring of 1860, to get out and ship his grain in store, on the same terms as contained in the written lease; and also that Chapman would

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immediately make such improvements in the warehouse as the defendant should direct, for ten per cent on the cost thereof, as rent of such repairs, which the defendant agreed to pay. In pursuance of this agreement, Chapman, on the 18th of March, 1859, sent a carpenter to make the repairs, who commenced preparations therefor, and could have completed them by the 1st of May, at an expense of about \$500. Soon thereafter, and before any actual repairs were made, Chapman, by parol, contracted to sell and convey the premises to the plaintiff, subject to the lease, making no mention of the contract to repair or improve the warehouse. Immediately on making this contract, Chapman declined to make any repairs, and withdrew his carpenter from the work, because he had contracted to sell. On the 26th of April, 1859, Chapman and his wife conveyed the premises to the plaintiff, by deed. No mention was made in the deed, or in any instrument in writing, of the letting of the premises to the defendant. The referee found as a matter of fact that by the verbal contract to take the land subject to the lease, the plaintiff understood the rent to be as the warehouse then was, and Chapman intended, subject to that rent. On the 1st of May, 1859, the plaintiff informed the defendant that he had purchased the premises of Chapman; that the agreement was that the defendant was to have them a year longer; and desired to know if he wanted them. The defendant informed him that he did want them, and had rented them of Chapman for one year from May 1, 1859, and that he should not make any contract with the plaintiff to interfere with his contract with Chapman. That Chapman had agreed to repair, and if he did not repair, he, the defendant, would hold him (Chapman) for damages. The plaintiff replied he should not repair, and knew nothing of such a contract. These statements were found by the referee to be not merely statements of the parties, but facts in the action. The defendant thereupon occupied under the plaintiff, as his landlord, and regularly, and without any objection or condition,

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paid him three quarters' rent as they successively fell due. No repairs were made, and the last quarter's rent remained wholly unpaid. The repairs would have cost \$500, and the increased yearly rent of the demised claimed premises would thereby have been \$125.

On these facts the referee found, as conclusions of law, that the contract for repairs was broken by Chapman, before he conveyed to the plaintiff. That on the execution of the deed, the agreement to repair was not running with the land, but, having been broken, was a chose in action, only. That only the reversion and the rent passed to the plaintiff by the deed, and not the chose in action. That the contract to repair had not been assigned to the plaintiff, and was a contract personal to Chapman, at the date of the deed. That the defendant elected to occupy under the plaintiff, and attorned to him by the consent of Chapman, with notice to the plaintiff by the defendant that he, the defendant, should not waive his right of action against Chapman for damages for a breach of his contract to repair. That the plaintiff had not incurred any liability to the defendant available as a defense in this action; and that the plaintiff was entitled to recover the last quarter's rent, at the rate of \$250 per annum, with interest. Judgment was entered accordingly.

T. R. Strong, for the appellant.

J. T. McKenzie, for the respondent.

By the Court, WELLES, J. The contract made by Chapman with the defendant, to repair the warehouse, was broken by the former before he conveyed to the plaintiff. This contract was made in February or March, 1859, and while the defendant was in possession under a verbal lease from Chapman, which would expire on the 1st of May thereafter, and by it the repairs were to be made immediately, so that the defendant could enjoy the benefit of them during the year commencing May 1, 1860. Chapman accordingly employed

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Pickett, the carpenter, to make the repairs, who commenced the work in March, 1859. Afterwards, and in the same month of March, and before he conveyed the premises to the plaintiff, but after he had agreed by parol to do so, he ordered Pickett to quit the work. Pickett accordingly quit the work, and during the same month told the defendant that Chapman had sold out, and that he was ordered to discontinue the work. There can be no doubt, from the evidence, that Chapman refused to make the repairs in consequence of his agreement to sell to the plaintiff. The repairs were never resumed or made, but were distinctly abandoned by Chapman. On the 26th of April, 1859, Chapman and wife conveyed the premises to the plaintiff. Chapman's agreement to repair being thus broken, it became a chose in action in the defendant's favor, against Chapman, for which he could have maintained his action, after the 1st of May, 1859. On that day the plaintiff or his agent refused to recognize any liability to repair, and the defendant, with notice of such refusal, attorned to the plaintiff, and paid him the first three quarters' rent promptly, as they became due. On the 1st day of May, 1860, the defendant was about to give his check for the last quarter's rent, but remarked to the plaintiff that he might want a few days to get his grain out and ship it. Whereupon the plaintiff proposed to wait until the end of the term, and settle it then; to which the defendant readily and unconditionally assented.

It seems to me, under the facts found by the referee, that the plaintiff is not liable on Chapman's contract to repair, for the reason that the contract was broken before the latter conveyed to the former, and Chapman's liability for the breach was complete before the plaintiff had acquired any legal estate or claim to the premises, and did not therefore legally attach itself to the plaintiff as grantee of the fee, by the deed from Chapman.

But if any doubt exists, as to this proposition, there is another view which leaves no doubt on the subject. The

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plaintiff, on the 1st day of May, 1859, called on the defendant at the demised premises, and informed him that he had purchased the premises of Chapman, and desired to know if the defendant wanted them another year. The defendant replied that he did want them, and had rented them of Chapman for one year from May 1, 1859, and should not make any contract with the plaintiff to interfere with his contract with Chapman. That Chapman had agreed to repair, and if he did not, the defendant would hold him (Chapman) for damages. The plaintiff replied he should not repair, and knew nothing of such a contract. Here was a distinct repudiation by the plaintiff of Chapman's contract to repair, after which the defendant continued in possession for the whole of the ensuing year, attorning to the plaintiff by the payment of rent as it became due, without objection, except the last quarter, and then agreed to pay that as soon as he could get his grain shipped, as before stated. This, it seems to me, is clear evidence, *prima facie*, at least, of a waiver by the defendant of any claim upon the plaintiff on Chapman's agreement to repair.

For the foregoing reasons, I think the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Wallis, Justices.*]

 KINSEY vs. FORD.

Where, in an action upon a judgment, the defendant, by his answer, puts in issue the existence of a regular, valid and legal judgment, any evidence tending to show the judgment illegal or void, is competent. Hence a certified copy of the judgment record, showing that since the joining of the issue the judgment has been vacated, is admissible.

THIS was an action upon a judgment recovered by the plaintiff against the defendant, in the court of common

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pleas of Tioga county, in the state of Pennsylvania. The answer contained a general denial of the allegations of the complaint, alleged that there was no such record, and claimed a set-off. A reply was served, putting the cause at issue, on the 5th of October, 1859. The action was tried at the circuit, before the judge, without a jury. The judge found the following facts: That judgment was recovered by the plaintiff, against the defendant, in the court of common pleas of Tioga county, Pennsylvania, for \$300, on the 14th of December, 1857, and that said court had jurisdiction of the defendant and of the subject matter of the action. That after the recovery of said judgment, the same was by said court of common pleas, by a rule duly made and entered of record, on the 20th day of October, 1859, stricken from the record of said court. That by a statute of the state of Pennsylvania, and a standing rule of the said court of common pleas, [setting forth the statute and rule referred to in the opinion of the court in this case.] That the said action was embraced in the cases specified in the said statute and rule of court, and that no statements were filed by the plaintiff in said action, in compliance with such statute and rule. As a conclusion of law, the judge found that the plaintiff was entitled to a judgment against the defendant for \$300 and interest. On the trial, the plaintiff offered in evidence a certified copy of the judgment record in the court of common pleas of Tioga county. The record was objected to, by the defendant, but was received and read in evidence. The defendant read in evidence, subject to objection, the statute of Pennsylvania and rule of court before mentioned. Also a certified copy of the record of the same judgment, containing, after the order for judgment, the following entry, which was read in evidence: "Sept. 15, 1859. Rule to show cause why judgment shall not be stricken off. Oct. 20, 1859. Rule made absolute." This copy of the record was certified by the prothonotary, and presiding judge, December, 14, 1859. Before the record and rules were read in evidence, the plain-

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tiff's counsel objected to the introduction and reading of the rule of September 15, 1859, to show cause, and that of October 20, 1859, making it absolute, on the grounds, 1. That it was immaterial; 2d. That the rules having been made subsequent to the service of the answer, were not competent under the pleadings, no supplemental answer having been served; 3d. That the judgment sued on being valid and existing at the time of the commencement of the action, and at the time of service of the defendant's answer, any matter of defense arising subsequent to that time was not competent, under the issue as made. The court received the evidence subject to the objection, reserving the question.

Judgment being entered in accordance with the findings of the judge, the defendant appealed.

Geo. T. Spencer, for the appellant.

Geo. B. Bradley, for the respondent.

By the Court, WELLES, J. The only question in this case is whether the evidence of the vacatur of the judgment was admissible, under the pleadings. The vacatur was entered after the issue made by the pleadings, and upon which the parties went to trial, was joined. It is claimed on the part of the plaintiff that when the issue was joined there was a valid subsisting judgment, as stated in the complaint, which had not been reversed or vacated. That the defendant's answer puts in issue the existence of such judgment, and upon that issue the cause was tried; and that the evidence of the vacating of the judgment was inadmissible under the answer. This view is plausible, but I think unsound. Upon the trial the plaintiff gave in evidence a certified copy, duly authenticated, of the record of the judgment, as stated in the complaint, and rested. The defendant then read in evidence the statute of Pennsylvania, and standing rule of the court of

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common pleas of Tioga county, Pennsylvania, which are set forth in the findings of the justice ; both of which he finds were in force at the time the judgment was entered in that court. The judgment was by default. The statute and rule both provide that it shall be lawful for the plaintiff in any of the actions enumerated therein, (of which this is one,) at such time as the court may appoint, not less than twenty days after the return day of said court, on motion, to enter judgment by default, a declaration or statement first having been filed, under the standing rules of said courts, notwithstanding an appearance by attorney ; unless the defendant shall have previously filed an affidavit of defense, stating therein the nature and character of the same. Providing that in all such cases no judgment should be entered by virtue of the act, unless the plaintiff should, within two weeks after the returning of the original process, file in the office of the prothonotary of the court a copy of the instrument of writing, book of entries, record or claim, except mortgages or judgments, on which action has been brought. The plaintiff neglected to file any statement in compliance with the said statute or rule.

The authority given by the statute to enter judgment by default was conditional. One condition was that the plaintiff should file the statement required, within the time specified. This condition was not complied with. The statute is imperative, that no judgment shall be entered unless the statement be filed, &c. The judgment was therefore irregular and void.

The allegations in the complaint are of a regular, valid and legal judgment. If not so in terms, it is necessarily so by plain and direct implication ; otherwise the complaint itself would be vicious. The answer puts in issue the existence of such a judgment. Any evidence, therefore, tending to show the judgment illegal or void, would be competent on the part of the defendant for the purpose of meeting and overthrowing the *prima facie* evidence furnished by the plaintiff of its ex-

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istence. The record of the judgment is not the judgment, but merely evidence of the judgment. On the same principle, the rule vacating the judgment is evidence, showing that the supposed judgment existed only in form, and was in fact no judgment. It was vacated for having been unlawfully obtained; and by the vacating of the judgment it is as if it never had been, and is not like a judgment reversed by error. (*Bac. Abr. Execution P.*, vol. 3, p. 737, *Bouv. ed. of 1846.*)

The certified copy or exemplification of the judgment record is received in evidence in lieu of the original record. It is certainly no better or higher evidence than the record itself. Now suppose the original record had been produced on the trial, it would have shown not only that a judgment had been in form entered, but that it had been vacated. The defendant produced a copy of the same record, which showed the judgment vacated. This, I think, was good and competent, under his answer of a general denial. It showed that no such judgment as the plaintiff had counted upon in his complaint, in reality existed. That it existed in form only, and was *ab initio* unlawful, irregular and void. The plaintiff produced evidence of only a part of what the record, at the time of the trial, showed; and the defendant would in any case be entitled to the benefit of what it showed had taken place at any time before the trial. It may be affirmed, without imputing any improper conduct to the plaintiff, or his counsel, that the copy of the record produced on their part, on the trial, was garbled evidence, and did not exhibit the truth of the case as it then existed. And the plaintiff can claim nothing more than the true view of the facts presented. If he neglected to present that view, the defendant had the right to do it without reference to the pleadings.

In my opinion the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles, Justices.*]

HAGAR and DERBY *vs.* KING.

K., S. & Co., copartners, being indebted to the plaintiffs in the sum of \$8207.75, K., one of the firm, agreed by parol, with the plaintiffs, that in consideration that the latter would receive \$10,000 of the bonds of a rail road company, in payment of such indebtedness of the firm, he, K., would at a future day, at the plaintiff's request, purchase the same bonds of them, and pay them therefor the said sum of \$8207.75. *Held* that the agreement was within the statute of frauds, and void, for the reason that it was not in writing, and no part of the purchase money was paid. JOHNSON, J. dissented.

Held, also, that the plaintiffs could not recover, upon the contract for the purchase of the bonds, without proof of a tender of the bonds, or of a demand upon the defendant, of performance.

THIS was an appeal from a judgment entered at the circuit, upon a verdict. The complaint alleged that in December, 1853, the firm of King, Stancliffe & Co., of which firm the defendant was a member, were indebted to the plaintiffs in the sum of \$8207.75 for work performed by the plaintiffs in graveling a portion of the Canandaigua and Niagara Falls rail road. That the plaintiffs received in payment of said debt, from the rail road company, their bonds to the amount of \$10,000, upon the promise and agreement of the defendant, that in consideration that they would receive said bonds in payment of their debt, he would at any time after two weeks, at the request of the plaintiffs, take and purchase said bonds of the plaintiffs and pay them therefor the said sum of \$8207.75, with interest; in consideration of which promise, in January, 1854, the plaintiffs did receive the bonds in payment of the debt. That after the two weeks had elapsed the plaintiffs requested the defendant to purchase the bonds of them, according to the agreement, which he refused to do; except that on the 20th of February, 1854, the defendant paid the plaintiffs \$100 to apply on the sum so agreed to be paid, and they transferred to him one of the bonds. That in June, 1854, the plaintiffs received the further sum of \$350 to apply on said sum agreed to be paid by the defendant for the bonds. That the plain-

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tiffs are ready and willing, and at all times have been, to transfer and deliver the remainder of the bonds to the defendant, on his performing his agreement; and they demanded judgment for \$8014, and interest from June 1, 1854. The answer denied every allegation of the complaint. The cause was tried at the Ontario circuit, in May, 1860, before Justice JOHNSON and a jury. Upon the trial, it appeared by the testimony of the two plaintiffs, Hagar and Derby, that in May or June, 1853, the plaintiffs made a parol agreement with King, Stancliffe & Co. to gravel a portion of the Canandaigua and Niagara Falls rail road, from Batavia west, to Tonawanda; under which agreement they worked from June to November, of that year, and that monthly estimates were made, of their work, by Mr. Porter, the chief engineer of the rail road company, which estimates were paid by King, Stancliffe & Co. until November. That the final estimate amounted to about \$8200. That the defendant King wished the plaintiffs to take from the rail road company, for this indebtedness, their mortgage bonds in payment of the debt. That they declined for some time to do so, but on the 19th of December, 1853, an arrangement was made between the plaintiffs and King, by which they were to take \$10,000 of the bonds of the rail road company, for their debt; and King agreed that if they would take the bonds, he would, in the course of ten days, take the bonds of them and give them the money for them. That in pursuance of this agreement they took an order for the bonds and obtained them from the rail road company, and afterwards presented them to the defendant, and asked him to pay the money; that he postponed doing so, for a time, and finally refused. They also testified that their claim against King, Stancliffe & Co. was relinquished by the receipt of the bonds, and the promise of the defendant; that they received from the rail road company one installment of interest on the bonds, being interest for six months. At the time of the settlement, in December, 1853, the plaintiffs received from S. Rand, vice president of

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the rail road company, a due-bill for the amount of this claim, \$8207.75, payable in bonds, and gave him a receipt for all demands for graveling the road. This due-bill was indorsed by the plaintiffs, and delivered to the treasurer of the rail road company, who issued to them the bonds; and these papers were produced by the receiver of the rail road company, from their vouchers. Upon the trial of the cause they did not produce the bonds, or offer them in evidence; and they admitted that they had only \$7900 of them in their possession.

The plaintiffs having rested, the defendant moved for a nonsuit, on the following grounds: 1. That the agreement claimed to have been proved by the testimony was void, there being no consideration for it. 2. That it was a parol agreement to answer for the debt of a third party, and therefore void. 3. That the contract as proved was a parol agreement for a sale by the plaintiffs, and a purchase by the defendant, of ten thousand dollars of bonds, for the sum of \$8270.75, and was void. 4. That if it was a valid contract, there was no evidence of a performance on the part of the plaintiffs. That there was no evidence of a tender of the bonds to the defendant, or of a demand upon him to fulfill the contract on his part. 5. That there was no evidence that the plaintiffs, at the time of the commencement of this action, had or that they now have the bonds, or that they can produce them, or comply with the contract on their part. That the plaintiffs cannot keep the bonds and ask for a verdict against the defendant. 6. That there was no evidence upon which a proper rule of damages could be laid down.

The court denied the motion for a nonsuit, and the defendant excepted. The jury found a verdict in favor of the plaintiffs for \$11,348.88, and the defendant appealed from the judgment.

H. O. Chesebro, for the appellant. I. The alleged agreement, for the breach of which the action is brought, was void,

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by the statute, there being no note or memorandum in writing of the agreement, signed by the parties, nor any acceptance or receiving of any of the bonds by the alleged purchaser, at the time, nor any payment by the purchaser, of any part of the purchase money. (2 R. S. 3d ed. 195, § 3. *Shindler v. Houston*, 1 Comst. 261. *McKnight v. Dunlop*, 1 Selden, 537.)

II. The fact that the defendant was a member of the firm of King, Stancliffe & Co. at the time of the alleged agreement with the plaintiffs, does not affect the case. There was no consideration for the promise, even at common law. But, if it should be held that there was sufficient consideration to uphold the promise at common law, it is nevertheless void by the statute, for not being in writing. (*Mallory v. Gillett*, 23 Barb. 610; *S. C.*, 21 N. Y. Rep. 412, 430. *Nelson v. Boynton*, 3 Metc. 396. *Thompson v. Alger*, 12 id. 428.)

III. The plaintiffs should have been nonsuited upon the 5th ground of the defendant's motion.

IV. When the plaintiffs rested, they had produced no evidence upon which a proper rule of damages could be laid down, and they should have been nonsuited upon that ground. They made no proof of the value of the bonds at or about the time of the refusal of the defendant to take them, nor any proof upon which the proper rule of damages could have been given to the jury. If the plaintiffs were entitled to recover at all, their damages were the difference between the value of the bonds at the time of the refusal of the defendant to comply with the contract, on his part, and the price he was to pay for them. (*Dana v. Fiedler*, 2 Kernan, 40, 48. *Thompson v. Alger*, 12 Metc. 428. *Stewart v. Cauty*, 8 Mees. & Wels. 160. *Boorman v. Nash*, 9 Barn. & Cress. 145; 17 Eng. Com. Law Rep. 73. *Shannon v. Comstock*, 21 Wend. 457.) They could not hold the bonds five years after the refusal of the defendant to take them, and until they became valueless, and then recover the full contract price.

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J. C. Smith, for the respondents. I. The discharge or extinguishment of the debt against the *firm* of King, Stancliffe & Co. was a good consideration for the defendant's promise. (2 *Am. Lea. Cas.* 184, and cases there cited.) So was the agreement to give the defendant *time* for its payment, it being due presently from the firm. (*Id.* 184, 185.)

II. The agreement between the parties was not a sale, or a contract for the sale of the bonds in question by the plaintiffs to the defendant, within the meaning of the statute of frauds, (2 *R. S.* 136, § 3; *Pars. on Cont.* 450; *Hilliard on Sales*, 26;) but a mode adopted by them for the payment by the defendant of the debt owing to the plaintiffs. (*See Taft v. Sergeant*, 18 *Barb.* 320, 323.) The plaintiffs did not become the absolute owners of the bonds. If the bonds had risen in value, the defendant would have had a right to *redeem* them, on paying or tendering the amount of the debt within the time allowed by the agreement. And his judgment creditors would have had such right, on showing a want of other assets to satisfy their executions.

III. The defendant's promise was not one for the payment of the debt of *another*, within the meaning of the statute of frauds. (1.) He was already liable for the debt, jointly with the other members of the firm. (2 *Pars. on Cont.* 305, 6, 7. *Costling v. Aubert*, 2 *East*, 325. *Files v. McLeod*, 14 *Ala. Rep.* 611.) (2.) The promise was founded on a new and distinct consideration. (*Leonard v. Vredenburg*, 8 *John.* 39, and cases cited in note. *Roberts on Frauds*, 232.)

IV. The plaintiffs were entitled to recover without returning or producing the bonds at the trial. (1.) The offer of the plaintiffs to return the bonds at the time required by the contract, and the defendant's refusal to receive them and pay the debt, gave the plaintiff a complete and immediate right of action for the money. (*See Slingerland v. Morse*, 8 *John.* 474; *Case v. Green*, 5 *Watts*, 262.) The defendant cannot defeat this right of action by a subsequent demand and refusal; especially if made after suit commenced and at the

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trial; for the plaintiffs were not bound, as in a tender of money, to keep their tender always ready. (*See Lamb v. Lathrop*, 13 *Wend.* 95; *Zinn v. Rowley*, 4 *Barr*, 109.) By the offer and refusal, the title of the bonds became absolute in the defendant, and the plaintiffs held them, thereafter, as his bailees. A subsequent *conversion* by them of a part of the bonds is no bar to this action. At most, it only gives the defendant an action for his *damages*, which cannot exceed the value of the bonds at the time of conversion. (2.) The bonds were of no value, after the rail road was sold, in 1858.

WELLES, J. The contract between the plaintiffs and the defendant, upon which the judgment was recovered, was, substantially, that in consideration that the plaintiffs would receive the \$10,000 of rail road bonds in payment of the indebtedness of King, Stancliffe & Co. to the plaintiffs of \$8207.75, the defendant would at a future day, at the plaintiff's request, purchase the same bonds of the plaintiffs, and pay them therefor the said sum of \$8207.75, &c. The action is upon this contract of the defendant to purchase the bonds. It was unquestionably valid, at common law. The consideration was the agreement by the plaintiffs to receive the rail road bonds of the defendant in full discharge of the plaintiffs' demand against King, Stancliffe & Co., and the fulfillment of that agreement by the plaintiffs. This was a good consideration, and sufficient to uphold the agreement by the defendant to repurchase the bonds.

It is, however, objected on the part of the defendant that the contract was void for the reason that the same was not in writing. The statute is as follows: "Every contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, shall be void, unless, 1st. A note or memorandum of such contract be made, in writing, and be subscribed by the parties to be charged thereby; or, 2d. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in

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action; or, 3d. Unless the buyer shall at the time pay some part of the purchase money." (2 R. S. 136, § 3; *Id.* 5th ed. vol. 3, p. 222.)

The case shows that the contract was not in writing. No part of the rail road bonds had ever been received by the defendant under the contract, nor any thing paid by him on account of it.

It seems to me that the contract was within the statute referred to, and was void for not being in writing. The only possible question there can be on the subject, arises from the fact that the contract for the sale of the bonds by the plaintiffs to the defendant was coupled with the contract that the plaintiffs would take the bonds in payment and satisfaction of their demand against King, Stancliffe & Co. But *that*, it seems to me, can make no difference in this respect. The whole arrangement comprises two entire and independent agreements. The one for the sale of the bonds by the defendant to the plaintiffs, or that the plaintiffs would accept and receive them in satisfaction of their demand against King, Stancliffe & Co.; and the other, that after the plaintiffs had so become the owners of the bonds, they would sell them back to the defendant at the same price they had advanced King for them. The former has been fully executed, but the latter remains open and executory. It is true that the first contract was the consideration for the second, but how that circumstance relieves the case from the difficulty in question is more than I can discover.

After the plaintiffs had received the bonds, in discharge of their demand against King, Stancliffe & Co., they were fully, absolutely and unconditionally vested with the title to them, and it was out of the power of the defendant to reclaim them without the consent of the plaintiffs. They were received by the plaintiffs at considerably below their nominal value. If they had risen in market to above their par value, after the plaintiffs had taken them, it is not to be supposed they would have requested the defendant to take them back at the price

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at which they had received them. The agreement was that the defendant would, *at the request of the plaintiffs, take and purchase* the bonds, &c. The contract in this respect was one for the sale of the bonds by the plaintiffs to the defendant. - It was none the less so that it bound the defendant absolutely to purchase them, provided the plaintiffs so requested, and left it optional with the plaintiffs to sell the bonds to the defendant at a price agreed upon. It was nothing more nor less than a contract to sell the bonds to the defendant after the plaintiffs should become invested with the title to them; and being invalid in consequence of not being in writing, and not being saved from the operation of the statute by either the 2d or 3d subdivisions of the section of the statute referred to, I think the judgment should be reversed, and a new trial ordered, with costs to abide the event.

E. DARWIN SMITH, J. Upon the ground upon which this case was put at the trial, I think the verdict cannot be maintained. In his charge to the jury, the circuit judge instructed them that if they found that the plaintiffs were at work for King, Stancliffe & Co. under their promise to pay, and that in settling with them the defendant induced them to take the bonds of the rail road company, upon his promise to take said bonds of them within a short time, and pay for them the amount of the debts due them for the graveling, then it was a valid obligation—a good promise—and the plaintiffs were entitled to recover.

In another part of the charge the judge said, "if King, Stancliffe & Co. owed this debt to the plaintiffs, and King induced the plaintiffs to take the bonds, on his promise to take them and pay for them, it was a valid contract, and the plaintiffs were entitled to recover."

The plaintiffs' right to recover in the action is thus based upon *contract*; not upon the original contract to pay the plaintiffs for their work; but upon the contract of the defendant to *purchase the bonds*. This was a contract to purchase

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bonds of the nominal amount of \$10,000 for the price of \$8207.75. This was by parol; "no note or memorandum of it was made in writing and subscribed by the parties to be charged thereby," nor did the buyer at any time pay any part of the purchase money. It is a contract for the sale of "things in action," and is thus within the express words of the statute.

If there was a sufficient consideration for the contract at common law, as the charge assumes, that would not save it from the operation of the statute. It is nevertheless void. (*Mallory v. Gillett*, 21 N. Y. Rep. 412.) Probably in most of the cases where the statute declares the contract void, it would not be invalid for want of a sufficient consideration. The statute says, "if the contract is for the sale of goods, chattels or things in action for the price of fifty dollars or more, it shall be void, unless in writing," &c.

I can see no way to take the contract for the sale of the bonds in question, out of the statute. It was claimed on the trial that \$100 was subsequently advanced upon the purchase. This was not established in fact, and was not regarded as proved, by the circuit judge, and the point was not seriously made on the trial or here.

If the action had been for the original consideration, the question might then have arisen in the light in which it was presented by the counsel for the plaintiffs here, that this agreement to take the bonds was merely a provisional arrangement between the parties, and the defendant was not discharged from the debt. If the question had been then put to the jury whether these bonds were in fact actually taken and received by the plaintiffs, absolutely in payment of the debt, or conditionally only and for the benefit and accommodation of the defendant, a verdict for the plaintiffs, in this view, might possibly have been sustained. But the cause was tried and presented to the jury upon a different theory. It was tried as an action on the contract for the sale of the

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bonds, and the verdict cannot be sustained upon a different view of the plaintiffs' rights.

As the action is brought upon the contract for the purchase of the bonds, the plaintiffs were bound to prove a delivery or tender of the bonds at the time specified in the contract, and having done so, they would not be bound to prove that they kept them for the defendant. They would be entitled to sell them for the market value, and recover their damages for the refusal of the defendant to receive and pay for them, at the time, and for the price stipulated; or they might have kept the bonds for the defendant, ready to deliver at the trial, or at any earlier period when the defendant should become entitled to them. The claim of the defendant's counsel that the plaintiffs could not recover because there was no proof of a tender of the bonds, or of a demand upon him to fulfill the contract, it seems to me, was right, and the exception for the refusal of the judge to nonsuit the plaintiffs on this ground well taken. Several other exceptions appear in the case, but as I think there should be a new trial, it is hardly worth while to discuss them, as they are points which may not again arise.

I think there should be a new trial, with costs to abide the event.

JOHNSON, J. dissented.

New trial granted.

[MONROE GENERAL TERM, September 1, 1862. *H. Darwin Smith, Johnson and Welles, Justices.*]

SNOW and BUSH *vs.* JUDSON.

False statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact prevent such sales and injure the manufacturers in their business, constitute a cause of action.

It is no defense to an action for such false representations, to allege that the defendant holds a patent giving him the exclusive right to use a particular article which he claims the plaintiff's article resembles; and that the federal courts have exclusive jurisdiction of all causes of action for any violation of that exclusive right.

No question of patent or no patent, or in respect to any right the defendant may have, under his patent, or as to any violation of such right, can arise, in such an action, so as to deprive the state courts of jurisdiction.

A PPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint alleged that on or about the 10th day of January, 1854, letters patent were granted and issued out of the patent office of the United States of America, to Junius Judson, the defendant, bearing date on that day, whereby, after reciting that whereas Junius Judson and Alfred Judson, of Rochester, New York, have alleged that they have invented new and useful improved valves for governors, for which letters patent were issued to Junius Judson, dated November 5, 1850, as the assignee of the said Junius and Alfred Judson, which letters patent have been surrendered by them, the same having been canceled, and new letters patent ordered to issue to the said Junius Judson upon the amended specifications of the said Junius and Alfred Judson, &c., there purported to be granted to the said Junius Judson, his heirs, administrators or assigns, for the term of fourteen years from the said 5th day of November, 1850, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said valves. And the plaintiffs further stated, that after the making and issuing of the said letters patent, the said Junius Judson entered upon the business of making and vending governors, with valves made and constructed according to the plan and specifications annexed to said letters

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patent, and has hitherto continued said business to a large extent at Rochester, in the county of Monroe. That the plaintiffs, at Rochester, have for about one year last past been, and still are, engaged in the business of manufacturing governors for steam engines, with valves not constructed and operating upon or according to the plan and specifications annexed to said letters patent, but upon a plan and principle entirely distinct and different from valves described in said specifications, and in no way infringing said patent, and have been at great expense in providing a shop and materials, tools and machinery for such manufacture and sale, and would have done a lawful and profitable business therein but for the wrongful acts of the defendant. That the defendant wrongfully and maliciously, and with the declared object of injuring the plaintiffs, and breaking up and destroying their said business, and well knowing that the said valves are not an infringement of the rights granted by his said letters patent, and that they are not and none of them are constructed according to the plan and specifications attached to said letters patent, have by advertisement and publication in newspapers, and otherwise advertised as extensively as he has been able, that the said valves are such infringement, and has thus in repeated instances defeated the sale by the said plaintiffs of governors with valves so manufactured by them, the said plaintiffs, as aforesaid; the complaint specifying, particularly, several instances in which this had occurred. And that many other sales by the plaintiffs of such governors the defendant, by his said false claims, had prevented and continues to prevent, and thus had injured the plaintiffs to a large sum, and they had sustained damages thereby to five thousand dollars, which sum they claimed to recover.

The defendant demurred to the complaint, because it appears upon the face thereof, 1st. That the court has no jurisdiction of the person of the defendant, or the subject of the action; 2d. That there is a defect of parties plaintiff and defendant; 3d. That several causes of action have been im-

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properly united; 4th. That the complaint does not state facts sufficient to constitute a cause of action.

Selden, Munger & Thompson, for the appellant.

Geo. H. Humphrey, for the respondents.

By the Court, JOHNSON, J. There can be no doubt that a good cause of action is stated in the complaint. The facts, as admitted by the demurrer, are that the defendant intentionally made false statements in regard to the articles manufactured by the plaintiffs, for the purpose of preventing sales by them, of such articles, and thereby did prevent such sales, and greatly injured them in their business. This constitutes a cause of action. (*Benton v. Pratt*, 2 Wend. 385. *White v. Merritt*, 3 Seld. 352. *Gallager v. Brunel*, 6 Cowen, 346.)

The only question for consideration, therefore, is, whether the court has jurisdiction of the subject of the action. The subject matter of the action is the very common one of fraudulent misrepresentations by one party, to the prejudice and direct injury of another; and but for the elaborate and ingenious argument of the defendant's counsel, I should have supposed there could be no question in respect to the jurisdiction of this court to try it. Of course the argument goes to the extent of insisting that a final judgment rendered upon this demurrer, by this court, would be a nullity, because the want of jurisdiction would appear upon the face of the record. Unless the argument goes this length, its fallacy must be but too apparent. This would be true, I suppose, if the alleged injury and cause of action grew out of the infringement of a right secured by a patent; because it must be conceded that this court has no jurisdiction in such a case, and the want of it would, in the case supposed, appear upon the face of the record. But this is no such case. The violation of the rights secured to the patentee, and his assigns, is no part of the cause of action alleged. The patent, while it confers an ex-

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clusive privilege upon the legal owner of the right, as respects the use of the invention, or the continuance, confers no right or privilege beyond that, and secures no immunity either to the person, or the acts, or the other property of such owner. He still remains amenable to the ordinary tribunals of justice, upon his promises, and for his tortious acts, the same as though he had no exclusive right whatever, even though they relate, in part, to this exclusive right. If he assails and injures another, with his patented implement, or, for the purpose of injuring, asserts a falsehood in regard to it, and thus effects the intended injury, the exclusive right affords no shield, and has nothing to do with the cause of action, except, it may be, incidentally, and as part of the evidence to establish it. This must be so, or the consequence would be a flat denial of justice in a case like this. The plaintiffs could not maintain this action in the United States courts, and must be remediless unless they can prosecute here. The only cause of action alleged is the false assertion and the resulting injury, and the demurrer admits the speaking of the words, their falsity and the alleged injury. Upon the case as it thus stands, there does not seem, to me at least, to be much room for an argument. The defendant comes, admitting the fraud and the injury, and says that the action cannot be maintained in this court, because he holds from the general government an exclusive right to the use of a particular article which he, though falsely, claimed the plaintiffs' article resembled; and that the federal courts have exclusive jurisdiction of all causes of action for any violation of this exclusive right. It is apparent that the exclusive jurisdiction claimed does not cover the cause of action alleged. The case does not come within the letter or the intention of the act of congress. By the act of congress of July 4, 1836, jurisdiction is given to the circuit court of the United States, or any district court having the same powers, of "all actions, suits, controversies and cases arising under any law of the United States granting or conferring to inventors the exclusive right to their inventions

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or discoveries." In respect to all such cases state courts have no jurisdiction. (*Dudley v. Mayhew*, 3 Comst. 9.) But in an action to enforce the specific performance of a contract for the sale or use of a patent right, it has been held that neither the circuit nor the district court of the United States had any jurisdiction when the parties both resided in the same state in which the action was brought. (*Brooks v. Stolley*, 3 McLean, 523. *Burr v. Gregory*, 3 Paine, 426.) In case an issue should be joined in the action, and the plaintiffs put to their proofs to maintain it, they would, I apprehend, be compelled to show affirmatively that their article bore no such resemblance to that of the defendants, as to constitute an infringement of his right. But this would in no sense be an inquiry into an injury to the defendant's exclusive right, nor would it involve any question or controversy under the law granting the patent. It would be a mere comparison of two manufactured articles, in respect to the identity of the plan of construction, and for the purpose merely of establishing the falsity of the assertion, out of which the alleged cause of action has arisen.

The cases cited by the defendant's counsel do not sustain his position. If under the general issue, or any other answer which the defendant may properly interpose, the trial of the action would necessarily involve an inquiry into the nature and extent of the defendant's rights under his patent, and to a determination of those rights, this court, as those cases show, would have no jurisdiction to try the action—as in that class of actions where the issue to be tried is prize or no prize. In all such cases, whatever be the form of the action, if that question arises and is to be tried and determined, the action must be tried in the admiralty court, and no other court has jurisdiction. This is clearly shown in the case of *Hallett v. Novion*, (14 John. 278; S. C. 16 id. 327,) where all the previous cases are reviewed and commented upon by the distinguished counsel for the respective parties, and by

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the court. No matter how the question may be determined, if it is in issue to be tried.

But in this case, no question of patent or no patent, nor any question as to any right the defendant may have under such patent, or any violation of such right, can possibly arise to be tried. The existence of his patent, and all his rights under it, are conceded in the bringing of the action, and the only issue to be tried would be fraud or no fraud.

I am of the opinion, therefore, that the demurrer was properly overruled at the special term, and that the order should be affirmed.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Welles and J. C. Smith, Justices.*]

PECK vs. ARMSTRONG.

A contract for the sale and delivery of corn, requires that the corn shall be in good condition, and marketable, without any express words to that effect. And when corn delivered in pursuance of such a contract is not good and merchantable, but is damaged, the purchaser has a right to refuse to receive it, and to rescind the contract, and to recover back the money advanced upon it, with interest.

The defendant, having contracted to sell to G. a quantity of corn, delivered the same to C., a warehouseman, with G.'s consent, for the purpose of fulfilling his contract, taking from C. receipts stating that he had received the corn of the defendant *in store*. But C. was not authorized to receive any but merchantable corn, upon the contract, or to waive any substantial defects. *Held* that the receipts were valid and binding contracts, determining conclusively on what account the corn was received, and in what character C. received it. That their legal effect was to retain the title to the corn in the defendant, with the right to withdraw the grain at pleasure, or to make any other appropriation of it. And that such delivery to C. was not to be deemed a receipt of the grain by G. as a fulfillment or on account of the contract.

Held, also, that the legal effect of such receipts could not be changed by parol evidence of conversations tending to a different conclusion.

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APPEAL from a judgment entered upon the report of a referee. The action was brought to recover damages for the non-performance of a contract for the sale and delivery of a quantity of corn, and to recover back \$100 paid by the plaintiff to the defendant, on account of said contract. The following facts were found by the referee: That in the month of April, or May, 1859, one Theodore S. Goddard employed the plaintiff to purchase a quantity of corn for him, to be good and merchantable, and of the quality and kind suitable for the New York city market, and authorized the plaintiff to employ agents under him. That one William A. Cook kept a warehouse at Lima station; that the plaintiff employed him to purchase such corn for Goddard, and authorized him to contract for corn to be delivered at his, Cook's, warehouse, and to receive and pay for the same. That Cook made an agreement with the defendant for the purchase of his crop of corn then on hand, at the same time paying him \$100 on account of such purchase, and as part payment for the corn. That the defendant thereupon executed and delivered a receipt in writing, in these words:

"Rec'd of Wm. A. Cook one hundred dollars, to apply on sale of my crop of corn, from five to six hundred and fifty bushels, sixty pounds to the bushel, at 85 cents per sixty pounds, to be delivered at South Lima.

May 14, 1859.

THOMAS ARMSTRONG."

That said contract was entered into for and on behalf of said Goddard, and for his benefit solely, the money paid being the money of Goddard. That under and in pursuance of this contract the defendant commenced to thresh the corn, and draw it to the warehouse of Cook and deliver the same. That he delivered 496 bushels and 17 pounds; the same being delivered in bags. That Cook examined a portion of the corn, and did make some objection to it, but did not refuse to receive it on the contract. That neither the plaintiff nor Goddard saw or examined the corn until after it was all delivered, when they refused to receive it, on the ground

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that it was not merchantable corn. That as the corn was delivered, Cook gave the defendant separate receipts for each load, in all respects similar to the receipt for 496 bushels 17 pounds, hereinafter set forth. On the 13th of June, 1859, after all the corn was delivered, the defendant demanded his pay, of Cook, who promised to write to Goddard that the corn was delivered, and to come up, or send the money to pay for it; and he did thereupon write to Goddard. That the defendant then produced the receipts which had been given from time to time as the corn was delivered, and from them computed the whole amount delivered, for which Cook gave to the defendant a receipt for the whole, as follows: "Received of Thomas Armstrong in store, 496 bush. 17 lbs. of corn. So. Lima, June 13, 1859. Wm. A. Cook." The defendant subsequently applied to Cook for his pay, for the corn, and on the 25th of June, Cook told him that Goddard had been up, and refused to take the corn because it was not marketable, and that he, the defendant, could sell it to whom he pleased. That soon after this the defendant sold the corn to another person, for 75 cents per bushel, that being then the highest market price for corn. That after the corn was so sold, the defendant tendered to Cook \$50.40 of the money received of Cook on the contract, in advance, which Cook declined to receive. That at the time the contract was made, the market price of corn was 85 cents a bushel of 60 pounds; that before the corn was delivered the market fell to 75 cents a bushel, which was the price at the time the delivery was completed. That the corn delivered was not good or merchantable corn, but was damaged, by means of horse manure and urine, and a portion of musty corn having been mixed with it by the defendant, and that Cook appropriated a portion of the corn to his own use. That after the 25th day of June, 1859, Goddard and the plaintiff went to Cook's warehouse and examined the corn, which was the first time they had seen it, and claimed that it was not merchantable, and refused to pay for it, or receive it. That afterwards Cook

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demanded of the defendant the payment of the \$100 advanced to him, which he refused to pay. That before the commencement of this action Goddard and Cook severally executed to the plaintiff assignments of each of their interests in the subject matter thereof.

The conclusions of law of the referee, from the above facts, were, that the receipt, of June 13, 1859, was conclusive evidence that the corn in question was not delivered by the defendant and accepted by Cook, under the bargain made for the sale and delivery of the corn, on the 14th of May, 1859. That said receipt was a warehouse receipt, importing a contract that could not be explained or contradicted by parol; and that in arriving at a conclusion on the question whether the corn was delivered and accepted on the contract, and whether the defendant had performed the contract, on his part, the acts and declarations of the parties at the time of, and subsequent to, the delivery, could not be taken into consideration. That the receipt was conclusive evidence that Cook held the corn as a warehouseman, and as bailee for the defendant, subject to the right of Goddard or the plaintiff to accept or reject the same after examination, as it might or might not be the quality of corn which the defendant contracted to sell. That in consequence of the horse manure and urine, and the damaged corn mingled with the corn in question, it was not in good marketable condition, and was not good merchantable corn. That the contract of sale made by the defendant required him to deliver corn in good marketable condition. That because the corn was not in good marketable condition, the plaintiff and Goddard were justified in refusing to accept and pay for it. That the defendant had failed to comply with and perform the condition of the contract, on his part; and that as a measure of damages, the plaintiff was entitled to recover of the defendant the sum of \$100 so advanced by Cook, with interest from the time of the demand. To these conclusions of law the defendant excepted.

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George F. Danforth, for the appellant.

M. S. Newton, for the respondent.

By the Court, WELLES, J. The defendant's contract of May 14th, 1859, for the delivery of the corn, required it to be in good condition and merchantable; not in terms, but by an implication just as binding as if the obligation had been expressed. Cook, in purchasing and receiving the corn, acted as sub-agent, under the plaintiff, for Goddard. He had no authority from Goddard or from the plaintiff to purchase any but good and merchantable corn. The referee finds that the corn which Goddard authorized the plaintiff to purchase, or cause to be purchased by others for him, was to be good and merchantable; and such would be the legal interpretation of the transaction, in case nothing had been said by the parties in relation to the quality of the corn. This the defendant knew, or was bound to know, and must be treated as if he actually knew it.

The corn delivered was not good or merchantable, but was, as the referee finds, "damaged by means of horse manure and urine, and a portion of musty corn having been mixed with it by the defendant."

The only question remaining is, did Goddard receive the corn as a fulfillment or on account of the contract of the defendant to deliver. He has never in fact received any corn of the defendant, on the contract or otherwise, but on the contrary, had distinctly refused to receive it, for the reason that it was not merchantable. If any person authorized by him to waive the defects in the quality of the corn has received it for him, he is concluded thereby, the same as if he had received it himself, and, with a knowledge of the condition of the corn, had waived the defects. But neither Cook nor the plaintiff was authorized to receive any but merchantable corn upon the contract, or to waive any substantial defects in it. But no corn has been received of the defendant

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on the contract, by any one. Cook, to whom the corn was delivered, was not only the agent of Goddard in contracting for the purchase of the corn of the defendant, but was also a warehouseman, and received the corn into his warehouse *in store* for the defendant. Such is clearly the legal effect of his receipts given from time to time, as the corn was delivered, and of the one given for the whole quantity, after it was all delivered, when the small receipts were taken up by Cook. They were essentially valid and binding contracts, and determined conclusively on what account the corn was received, and in what character Cook received it. By them he incurred all the liability and acquired all the rights incident to his business as a warehouseman, and was bound to ordinary diligence, and responsible for losses by ordinary negligence. He was bound to deliver the corn at any time to the defendant on request, or to his order. And although it is quite evident that the intention of the defendant in delivering the corn at the warehouse was for the purpose of fulfilling his contract, still, the legal effect of the receipts was to retain the title to the corn in himself, with the right to withdraw it at pleasure, or to make such other appropriation of it as he might choose. And the legal effect of the receipts cannot be changed by parol evidence of conversations tending to a different conclusion.

The \$100 paid the defendant on the contract has been demanded and refused. The defendant has sold the corn to another purchaser, and should refund the money received on the contract which has been rescinded.

The judgment, I think, is right, and should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles, Justices.*]

THE DANSVILLE SEMINARY *vs.* WELCH.

The defendant, with others, subscribed a paper by which he agreed to pay \$200 to the trustees or a committee to be appointed by the East Genesee conference of the Methodist Episcopal church, for the purpose of purchasing premises and erecting or procuring a seminary building or buildings and apparatus, to be located in D., and to be under the supervision and control of the East Genesee conference, &c. The subscription contained a provision that the said conference should establish and put in operation a seminary in D., with all reasonable dispatch. It was not to be binding until \$15,000 had been subscribed, nor until said conference should by resolution agree to accept the trust, and should nominate and ratify the appointment of trustees or committee to receive and expend the money. The sum of \$15,000 was subscribed. The conference duly accepted the trust reposed, and assumed the responsibility of directing the proposed enterprise, and appointed certain persons the first board of trustees of the institution, and authorized them to organize and obtain a charter. Such trustees were subsequently incorporated, by the regents of the university, under the name of the "Dansville Seminary." *Held* that by operation of law, as well as by the spirit and meaning of the subscription, the amount subscribed to the paper became due to the literary institution by its corporate name, and that an action upon the subscription paper was well brought in the corporate name of the seminary, without any formal direct assignment thereof from the committee originally appointed by the conference.

THIS was a motion by the plaintiff for a new trial, on a case and exceptions, which were ordered to be heard at general term, in the first instance. The action was brought upon a subscription paper, in these words: "We whose names are hereunto subscribed, mutually and severally agree to pay the trustees or a committee to be appointed by the East Genesee conference of the Methodist Episcopal church, as hereinafter mentioned, the sum set opposite our respective names, for the purpose of purchasing premises and erecting or providing seminary building or buildings and apparatus, to be located in the town of North Dansville, in the county of Livingston, N. Y., and to be under the supervision and control of the East Genesee conference of the Methodist Episcopal church, in the same manner that the Genesee Wesleyan Seminary at Lima was under the supervision and con-

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trol of the Genesee conference, before the division of said conference.

Said promise is upon the consideration of the mutual promise of each other, and upon the faith and understanding that the money so subscribed shall be expended by the trustees or committee to be appointed by said East Genesee conference, for the purpose aforesaid; and that said conference shall establish and put in operation a seminary in said town, with all reasonable dispatch; and said building or buildings, premises and apparatus to belong to said committee and their successors in office, while they shall sustain a seminary in said town; but in case of their failure so to sustain a seminary, the said premises, building or buildings and apparatus are to be sold, and the avails, after paying all demands against said institution, shall be divided ratably among the subscribers hereto, or their assigns or legal representatives. This subscription not to be binding until the sum of at least fifteen thousand dollars is in good faith subscribed by responsible persons, nor until the said conference shall by resolution agree to accept the trust herein provided, and shall nominate and ratify the appointment of trustees or committee to receive said money and expend it for the purpose hereinbefore mentioned.

Said sums to be paid in eight semi-annual installments, from the 1st day of September, 1857."

To this paper the defendant subscribed the sum of \$200. On the trial the court nonsuited the plaintiff, on the ground that the plaintiff could not sustain the action without an assignment of the subscription from the committee originally appointed by the conference.

The plaintiff relied upon the 111th section of the code, which requires an action to be prosecuted in the name of the real party in interest; and claimed that the corporation was the real party in interest in this case.

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Hubbard & Noyes, for the plaintiff.

J. W. Smith, for the defendant.

By the Court, WELLES, J. I think the plaintiff was improperly nonsuited. The action was brought to recover the amount due on a subscription by the defendant to pay \$200 to the trustees, or a committee to be appointed by the East Genesee conference of the Methodist Episcopal church, for the purpose of purchasing premises and erecting or providing a seminary building or buildings and apparatus, to be located in the town of North Dansville in the county of Livingston, and to be under the supervision and control of the East Genesee conference, in the same manner that the Genesee Wesleyan Seminary at Lima was under the supervision and control of the Genesee conference before the division of the conference. The subscription contained, among other things, a further provision that the said conference should establish and put in operation a seminary in said town with all reasonable dispatch. It was not to be binding until the sum of at least \$15,000 was in good faith subscribed by responsible persons, "nor until said conference shall by resolution agree to accept the trust herein provided, and shall nominate and ratify the appointment of trustees or committee, to receive said money and expend it for the purpose hereinbefore mentioned." There were other provisions in the subscription which are not necessary to be referred to for the purpose of deciding the motion for a new trial. It bears date Dansville, July 30, 1857.

Evidence was given on the trial tending to show that at least the sum of \$15,000 was in a short time subscribed in good faith by responsible persons. That at a regular session of the East Genesee conference of the Methodist Episcopal church, held at Canandaigua on or about the 18th day of August, 1857, the conference by resolution duly accepted the trust reposed, and assumed the responsibility of directing

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the proposed enterprise, on the terms proposed in the subscription; and also by resolution appointed eighteen persons by name as the first board of trustees of said institution, with instructions to hold their first meeting in the first Presbyterian church in the village of Dansville on the 1st day of September next thereafter, at 2 o'clock P. M., and authorized said board to organize and obtain a suitable charter for the institution of learning, which charter was to contain a provision for the renewal of said board by an annual election of at least six trustees from persons nominated from the East Genesee conference. Other resolutions were adopted by the conference, not material to be here mentioned.

Subsequently, and by a charter bearing date January 14, 1858, the trustees named in the resolution of the conference were duly incorporated by the regents of the university, under the name of "Dansville Seminary." The charter recited that Samuel W. Smith and others had in due form made application for the charter; that certain subscriptions had been obtained, and certain amounts contributed, for the endowment of said academy, and that they, the said applicants, were the subscribers and contributors for more than one-half of said amounts, and requesting that the said academy might be incorporated, &c., and nominating the persons named in the charter as the first trustees thereof. The charter was read in evidence without objection. The justice holding the circuit nonsuited the plaintiff, on the ground that the action could not be sustained in the plaintiff's name, on the subscription, without an assignment thereof from the committee originally appointed by the conference. In this, I think, the justice erred. No formal direct assignment from the committee was necessary. By operation of law, as well as by the spirit and meaning of the subscription, the amount subscribed became due to the literary institution by its corporate name, to endow which was the express object and design of the subscription. The seminary, by the terms of the subscription, was to be under the supervision and control of

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the conference. It was incorporated by the advice and direction of the conference, and the trustees named in the charter are all the identical persons appointed by the conference in pursuance of the terms of the subscription. I entertain no doubt that the action is well brought in the name of the plaintiff. There were other grounds stated in the motion for nonsuit, but as the decision by the justice laid them all out of view, and was founded upon this alone, I do not deem it necessary to consider them. If it was, I think they could be answered and shown to be untenable, assuming any of them to have been well taken. Yet as the justice did not consider them, and placed his decision upon the one stated, if he had held either of the others good, *non constat* but further evidence would have been offered and received on the part of the plaintiff, and the objections thus obviated.

These views require an order setting aside the nonsuit and directing a new trial, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, Campbell and Welles*, Justices.]

MANDEVILLE vs. GUERNSEY.

A conversation between a person who has been tried upon an indictment and acquitted, and one who was his counsel on the trial, had after the relation of counsel and client has ceased, no further proceedings being contemplated, upon a subject unconnected with that to which the employment of the witness as counsel related, is not a privileged communication.

THIS action was brought to recover damages for an assault and battery and false imprisonment. The evidence showed that the defendant came from the state of Pennsylvania into New York and arrested the plaintiff, took him into Pennsylvania, and confined him in the county jail at Wells-

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boro for several days. The defendant justified the arrest as sheriff of Tioga county, Pennsylvania, upon a bench warrant issued by the court of quarter sessions of that county, upon an indictment against the plaintiff for forgery. The plaintiff, after remaining in jail five days, was released, on giving bail. He was subsequently tried upon the indictment, and acquitted. Julius Sherwood was called as a witness on the trial of the present action, on the part of the defendant, and testified as follows: "That he resides at Wellsboro, and did in 1854. Is an attorney and counsellor at law of that state. I was one of the plaintiff's counsel on the trial of the indictment against him. After the trial closed, and the plaintiff was acquitted, plaintiff went to my office, and I there had a conversation with him in respect to the manner and the reason that he came from his house into Pennsylvania with the defendant." The witness being asked, "what was that conversation?" the plaintiff's counsel objected to the evidence, on the ground that the witness having been the plaintiff's counsel on the trial of that indictment, was not at liberty to disclose as a witness, by his testimony, the conversation referred to. The court sustained the objection, and excluded the evidence. The defendant excepted. The plaintiff recovered a verdict for \$425. A motion by the defendant, for a new trial, made at the circuit, was ordered to be heard in the first instance at a general term.

George B. Bradley, for the defendant.

F. C. Dininny, for the plaintiff.

By the Court, WELLES, J. The view I take of this case renders it unnecessary to consider particularly any of the questions raised upon the argument, excepting the one whether the evidence offered by the defendant, to be given by the witness Julius Sherwood, of a conversation between the witness and the plaintiff, was properly excluded.

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The witness Sherwood had testified that he was an attorney and counsellor of the state of Pennsylvania, and that he was one of the plaintiff's counsel on the trial of the indictment against him. That after the trial and acquittal of the plaintiff, he went with the witness to the office of the latter, and there had a conversation with the plaintiff in respect to the manner and the reason of his coming from his house into Pennsylvania with the defendant. The witness was then asked by the defendant's counsel what that conversation was. This question was objected to by the plaintiff's counsel, on the ground that the witness, having been the plaintiff's counsel on the trial of the indictment, was not at liberty to disclose as a witness, the conversation referred to. The objection was sustained, the evidence excluded, and the defendant's counsel excepted.

I am of the opinion that the conversation offered to be proved was not privileged. The relation of the parties to it as counsel and client had ceased. The plaintiff had been tried and acquitted, and no other proceedings in relation to the indictment, its trial, or the offense charged in it, appear to have been contemplated. Besides, the conversation embraced in the offer was upon a subject unconnected with that to which the employment of the witness as counsel related. The offer does not disclose what the conversation was, except that it was in respect to the manner and the reason of the plaintiff's coming from his house into Pennsylvania with the defendant. It does not appear how that question had any thing to do with the trial of the indictment; nor that the conversation was of a professional character on the part of the witness. If the defendant had been required to disclose what the conversation was which he proposed to prove, and it had appeared that it related to the plaintiff's right to maintain this action, and it could be gathered from it that the object was to elicit the opinion or advice of the witness on that subject, I should think the conversation was privileged. It would in that case have amounted to a retainer as counsel,

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for the time being at least, and the plaintiff would *prima facie* have been liable to the witness to pay him a counsel fee. But it would be a forced inference to say that such was the conversation, or its object. The form of the objection excludes the idea that the witness held any professional relation to the plaintiff, at the time of the conversation. It was put on the sole ground that the witness had been counsel for the plaintiff on the trial of the indictment. In such a case the objector holds the affirmative, and is bound to bring himself within the rule of privilege.

If my brethren concur with me in this view, there must be a new trial. The other rulings at the circuit, as also the charge of the judge to the jury, were each and all unexceptionable.

[MONROE GENERAL TERM, September 1, 1862. Johnson, Welles and J. C. Smith, Justices.]

FISHELL vs. WINANS.

Where, in an action to recover the price of wheat delivered under a contract, at a price fixed, the defendant sets up by way of counter-claim, the damages he has sustained by reason of the plaintiff's refusal to deliver the whole quantity agreed upon, he is, if he establishes such defense, entitled to be allowed as damages, the difference between the contract price of the wheat not delivered, and the market value thereof, at the time it was to have been delivered, with *interest* on that difference.

THIS was an appeal from a judgment upon a verdict, entered at the circuit. The action was brought to recover the purchase price of 236 bushels of wheat, sold by the plaintiff to the defendant, in November, 1858, at one dollar and fifty cents per bushel. The defense was that the plaintiff agreed to sell his whole crop, amounting to about 1000 bushels; and that, after delivering about 200 bushels, he refused to deliver the balance; and the defendant set up, by way of

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counter-claim, the damages he had sustained by reason of the non-delivery of the balance. The jury found a verdict in favor of the plaintiff for \$119.85.

J. A. Stull, for the appellant.

Newton & Ripsom, for the respondent.

By the Court, WELLES, J. The most important question litigated at the circuit was whether, in the fall of 1853, a valid contract was made between the parties, by which the plaintiff was to deliver his whole crop of wheat then in his barns, except what he needed for his own use, to the defendant at \$1.50 per bushel, to be paid for, \$250 on the 1st day of January, 1854, and the balance on the 1st day of April following. The evidence on this question was conflicting. The defendant proved the contract, by his own testimony, which was in several respects corroborated by other witnesses. The plaintiff in his own testimony denied making such contract, and was to some extent also corroborated. The plaintiff delivered to the defendant from 200 to 250 bushels of wheat in November, 1853. One of the plaintiff's witnesses testified to the quantity, fixing it at 236 bushels. The plaintiff admitted in his testimony that he had 860 bushels of wheat that he raised that year, which he disposed of after he had ceased delivering to the defendant, at \$2.25 per bushel.

It was proved that on the 1st of January, 1854, wheat was worth, in market, \$2.00 per bushel and in May following \$2.25.

By the contract as claimed by the defendant to have been proved, the plaintiff was to deliver his crop along as he could, conveniently. The defendant testified that on the 1st day of January, 1854, he tendered to the plaintiff \$250, provided he would give a receipt for it to apply on the contract. That he refused to take it; offered to

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receive the money, but would not accept it to apply on the contract. The judge charged the jury, among other things, in substance, that if they believed from the evidence that the plaintiff agreed with the defendant to deliver him his whole crop of wheat as claimed by the defendant, the latter was entitled to be allowed as damages for the plaintiff's violation of the contract the difference between the contract price, twelve shillings a bushel, and the market value of the wheat on the 1st day of January, 1854, and that the defendant was not entitled as matter of law to interest on this difference; and that they might allow interest or not, as the jury in their discretion thought proper. The defendant's counsel duly excepted to this part of the charge.

The defense was a counter-claim set up by the defendant for damages for the non-delivery of the balance of the plaintiff's wheat, pursuant to the contract as alleged by the defendant. The verdict of the jury was in favor of the plaintiff, for \$119.85, showing indisputably that they must have found the contract to deliver substantially as claimed by the defendant. Otherwise the verdict should and doubtless would have been for \$354, with interest from the 1st of January, 1854, on \$250, and from the 1st of April, 1854, on \$104, to the time of the trial, amounting to over \$150, and, with the contract price of the wheat delivered, to over \$500. The question then is, was the defendant legally entitled to be allowed interest on his counter-claim. In my opinion he was, and the judge should have so instructed the jury. The case of *Dana v. Fiedler*, (2 Kern. 40,) which was an action by the plaintiffs on a contract, to recover damages for the non-delivery of merchandise, the court of appeals held that the plaintiff was entitled to recover the difference between the contract price, and the market value of the goods at the time and place specified for its delivery, *with interest thereon*. Johnson, J. who delivered the only opinion in that case, remarks on the question of interest, as follows: "The party is entitled, on the day of per-

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formance, to the property agreed to be delivered. If it is not delivered, the law gives as the measure of compensation then due, the difference between the contract and market prices. If he is not also entitled to interest from that time, as matter of law, this contradictory result follows: that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount, that the longer a party is delayed in obtaining it the greater shall its inadequacy become." And again, after showing the consistency of leaving the question of interest to the discretion of the jury, the learned judge proceeds: "The right to interest, in actions upon contract, depends not upon discretion, but upon legal right, and in actions like the present is as much a part of the indemnity to which the party is entitled, as the difference between the market value and the contract price." All the judges, except Selden, concurred in these views of Judge Johnson. The case cannot be distinguished in principle, on this question of interest, from the one under consideration.

I think, also, the judge at the circuit erred in declining to charge the jury as requested by the defendant's counsel and in charging the contrary thereof, as stated in the case. Also in allowing the plaintiff to testify what his son said the defendant told him, when he was sent to inquire of the defendant whether he wanted any more wheat, &c. But the verdict would not be disturbed for these errors, because they were immaterial in view of the result, and have worked no injury to the defendant; the verdict having established the defendant's counter-claim, as we must intend from its amount, and related only to the question of the defendant's right to his counter-claim. If I am wrong in this, then the judgment should be reversed for the reason that the charge and the evidence improperly received and given might have been prejudicial to the defendant. There was a waiver by the defendant of full performance of the plaintiff's contract to deliver all his crop he had to spare. All the defendant said was, "if you will deliver me one half of the wheat you

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agreed to let me have, at the price agreed, I will let you off." The condition was never performed by the plaintiff. He at first agreed to the proposition, but afterwards expressly declined.

I think, for the error of the judge in his instruction to the jury on the subject of interest, as before stated, the judgment should be reversed and a new trial ordered, with costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, September 1, 1862. Johnson, E. Darwin Smith and Welles, Justices.]

KAVANAGH vs. THE CITY OF BROOKLYN.

Municipal corporations are not liable in damages for any injury or inconvenience to the owners of property upon the streets of the village or city, resulting from the improvement of the streets, such as grading, paving, laying curb and gutter stones, sidewalks, &c., by authority of law, when there is no negligence or unskillfulness in conducting the work of improvement.

Incidental damages to the owners of property, resulting from the establishing or altering of the grade of a street are not to be provided for, or paid, in any form, but are regarded and treated as *damnum absque injuria*.

The fundamental principle that prevails in all the statutes authorizing or providing for the grading, paving and improving of streets, is that the property thought to be benefited must pay all that is to be paid, and not the municipal treasury.

The rule of the common law is equally adverse to the claim of an individual property owner to be compensated for losses not resulting from misconduct or unskillful management, but arising necessarily from the making of the improvement.

When a duty of a judicial nature is imposed upon a public body, they are exempt from responsibility by civil action for the manner in which the duty is performed. But where a duty purely ministerial is violated, or negligently performed, by a public body or officer, an injured party may have redress by action.

The ordinance of a city corporation, directing the construction of a public improvement, within the general scope of its powers, is a judicial act; but the prosecution of the work is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner.

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APPEAL from a judgment of the city court of Brooklyn. The action was brought to recover damages claimed to have been sustained by the plaintiff, under the following state of facts : The plaintiff is the owner of a house and lot on the north side of Bergen street, near its intersection with Flatbush avenue, in the city of Brooklyn. The house was built about the year 1857, and on the grade of the street as then established. Subsequently the common council established a new grade about five feet higher, and caused a contract to be entered into in April, 1861, to grade and pave said Bergen street according to the new grade. The raising of the grade left the plaintiff's premises below the grade of the street as actually constructed, and also below Flatbush avenue, which had been graded some years previously. All the ground between the plaintiff's house and the junction of Flatbush avenue and Bergen street is vacant and below grade, and as the water ran down the avenue and Bergen street, portions of it overflowed into these vacant lots and against the plaintiff's house. The plaintiff claimed that the defendant should have caused an embankment to be constructed on the side of Bergen street next to the plaintiff's premises, so as to prevent the water from the street running on his lots, &c. It was not pretended that the work of building the street was unskillfully executed ; nor was the authority of the common council to alter the grade questioned ; but the liability of the city was claimed to result from the fact that the construction of the street, according to the new grade, necessarily caused the water to flow on the plaintiff's premises.

When the plaintiff rested, the defendant moved to dismiss the complaint. The motion was granted. A motion for a new trial was afterwards made and denied, and the plaintiff appealed from this order.

P. S. Crooke, for the plaintiff.

Alexander McCue, for the defendant.

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By the Court, BROWN, J. The plaintiff is the owner of a house and lot of ground situate on the north side of Bergen street, and near the intersection of the street with Flatbush avenue, in the city of Brooklyn. The house was built in the year 1857, and conformed to the grade of the street as then established. Afterwards the common council of the city established a new grade of the street, raising the surface thereof about five feet higher than the old grade, and caused a contract to be entered into, about the month of April, 1861, to grade and pave the street according to the new plan. In executing the contract the plaintiff's premises were left below the line of the street, and also below the face of Flatbush avenue, which had been graded before that time. The ground between the plaintiff's house and the junction of Flatbush avenue with Bergen street is vacant, and below the grade of the street. The surface water, in a heavy rain, came rushing down Flatbush avenue into Bergen street and from thence into the vacant lots adjoining and against the plaintiff's house, broke in the foundation wall, filled the cellar with water and soil, and otherwise materially injured the building. It was not claimed that the work of grading and paving the street had been done negligently or carelessly. But the injury to the plaintiff resulted from the improvement of the street in the manner stated. The authority of the common council to grade and improve the street is conferred upon it by the 4th title of the act of the 17th of April, 1854, to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick into one municipal government, and to incorporate the same. For this injury the plaintiff brought his action, in the city court of Brooklyn. He proved the facts stated, and rested. The court, upon the defendant's motion, nonsuited the plaintiff. He afterwards moved for a new trial, which was also denied; whereupon he appealed to this court.

It must be conceded that the injury to the plaintiff was the immediate result of the grading and paving the street

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upon an elevation of the surface thereof above the surface of his lot. The ground which he assumes and must maintain to entitle him to maintain this action is, that municipal corporations are liable in damages for any injury or inconvenience to the owners of property upon the streets of the village or city resulting from the improvement of the streets, such as grading, paving, laying curb and gutter stones, sidewalks, &c., by authority of law, when there is no negligence or unskillfulness in conducting the work of improvement. Nothing short of the affirmative of this proposition will uphold the present action. If a street is to be opened and paved and fitted to become one of the thoroughfares of a populous city, it will naturally be done upon some grade which will reduce the elevation and fill up the depressions of the ground more or less, with a view to facilitate the transit of vehicles and passengers, and to discharge from the face of the street the surface water. This is what is meant when the municipal statutes speak of grading a street. The process, when completed, will have the effect to leave the surface of some of the lands upon the line of the street elevated above the grade of the street and some of them depressed below it. In neither case are the lots fit for the uses of building. Their surfaces must be reduced, or elevated, as the case may be. And they are injured and their owners damnified by the improvement to the extent of the cost of effecting this work of reduction and elevation. The lots which require to be filled in to adapt them to the uses of occupation, may also become flooded with surface water from the adjoining lands, and the owners thus sustain an additional injury by the improvement. The statutes which authorize and provide for the grading, paving and improving streets, charge upon the property on the street, or in the immediate vicinity, the cost of effecting it. It is not a charge upon the treasury of the city. The statutes make no provision for subjecting the lands upon the street or in the vicinity to the damages resulting from such incidental injuries as I have referred to. They are never found in a street

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assessment; and this is a clear indication that they were not to be provided for or paid in any form. They are regarded and treated as *damnum absque injuria*. In executing the street improvement and assessment laws, the common council represent the owners of the property benefited, and act for them and in their behalf, and not for the public of the city, generally. The fundamental principle that prevails in all this class of statutes is, that the property thought to be benefited must pay all that is to be paid, and not the municipal treasury. The plaintiff's action is subversive of this principle; for it seeks to charge the common council with the duty of making compensation for losses—not resulting from misconduct or unskillful management, but resulting necessarily from the making of the improvement. If the rule contended for should prevail, a just and intelligent system of street opening and improvement would become impossible.

The rule of the common law is equally adverse to the plaintiff's claim to recover in the action. The powers and duty of the common council, in regard to the opening, grading and paving streets, are discretionary. When application is made to them for that purpose, they are to grant or deny it, according to their own view of what is right and expedient in the premises. The proceedings are brought before them upon petition, and they are to cause notice to be given, to the end that those persons interested may have an opportunity to be heard at the time and place designated for the hearing. If the common council determine that the petition for such improvement is signed by a majority of the persons owning lands situate on the line of the improvement, and that the assessment to be imposed upon each lot for the benefit to be derived from such improvement does not exceed one third of the assessed value of such lot, as the same is directed to be ascertained by the act, and no sufficient objections are made thereto, the common council shall make an order that such improvement be made and the contemplated

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work done. (*Sess. Laws of 1859, pp. 475, 476, 477.*) This act of the common council is judicial.

“When the duty alleged to have been violated is purely judicial no action lies, in any case, for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed.” This is the rule as expressed by Mr. Justice Beardsley in *Wilson v. The Mayor &c. of New York*, (1 Denio, 595,) which was a case in most respects like the present. *The Rochester White Lead Co. v. The City of Rochester*, (3 Comst. 463,) to which we are referred, was an action for an injury done to the plaintiffs by the careless, negligent and unskillful construction of a culvert under a street, for the passage of a stream of water. The plaintiffs recovered, but the gist of the action was the want of skill and the insufficiency of the culvert to carry away the water of the stream. The same principle is asserted—that when a duty of a judicial nature is imposed upon a public body, they are exempt from responsibility by civil action for the manner in which the duty is performed. But where the duty, purely ministerial, is violated or negligently performed by a public body or officer, an injured party may have redress by action. The ordinance of a city corporation directing the construction of the work within the general scope of its powers is a judicial act, but the prosecution of the work is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner. The plaintiff’s counsel also relies upon *Storrs v. The City of Utica*, (17 N. Y. Rep. 104.) It was an action against the city for omitting to keep proper lights and guards at night around an excavation it had caused to be made in the street. Here also the ground of the action

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was negligence, and nothing else. It also involved the question of the liability of the ultimate superior and that of the immediate superior for the negligence of the servant.

The order of the city court should be affirmed.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham* and *Lott*, Justices.]

KELSEY vs. CAMPBELL, Sheriff, &c.

An appeal without an undertaking is not effectual for any purpose, and is a nullity. It makes no change in the proceedings, but leaves them in the same condition they were in before the notice of appeal was given.

Hence, when the sureties in an undertaking on appeal fail to justify, and the court, upon motion, refuses them permission to justify, the notice of appeal, with all the proceedings connected therewith, fall to the ground, and the parties are remitted to the same condition they were in before the notice was given.

The appellants are thus left free to perfect a new appeal, with an undertaking which will stay the execution of the judgment.

APPEAL from a judgment entered at a special term, after a trial at the circuit before a justice of this court without a jury. The action was brought against the defendant as sheriff of Kings county for neglecting to collect and return an execution. The facts found by the justice are stated in the opinion of the court. The justice found and decided as conclusions of law, that the first appeal, by the failure of the sureties to justify, became ineffectual, and that the parties by reason thereof were placed in the same condition as if no appeal had been taken; that the subsequent appeal of the defendant in the execution, accompanied by the undertaking, affidavits of justification, acknowledgment and the other proceedings, operated as a stay of the sheriff's proceedings under the execution, and was a justification and defense to him in this action. He therefore ordered judg-

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ment to be entered for the defendant, with costs. The plaintiff appealed to the general term.

Britton & Ely, for the plaintiff.

P. S. Crooke, for the defendant

By the Court, BROWN, J. On the 26th of July, 1861, the plaintiff recovered a judgment in this court against Robert M. Ward, Walter S. Gove and Edward P. Morris, for the sum of \$687.69, which was docketed in Kings county clerk's office on the same day. On the 2d day of September, of the same year, he issued an execution against the property of Ward, Gove and Morris, with directions to collect the whole amount of the judgment with interest, which was placed in the hands of the defendant, sheriff of Kings county, to be executed, returnable on the 1st day of November thereafter. The defendants in the execution had goods and chattels within the county of the defendant, whereof he could have made the sum directed to be collected upon the execution. But he omitted to do so, and neglected to return the same at the return day thereof. Whereupon the plaintiff brought this action against the sheriff, and demanded judgment against him for the sum of \$687.69, with the interest. The action was tried before Mr. Justice LOTT, at the Kings county circuit, where the foregoing facts were not disputed. It appeared on the part of the defendant that a notice of appeal, with undertaking, affidavit and certificate of acknowledgment, were filed in the office of the clerk of the county of Kings, dated the 29th of July, 1861, the day they were filed, and copies thereof were on the next day duly served on the attorney for the plaintiff. Notice of exceptions to the sureties upon the undertaking was on the 1st day of August duly served by the plaintiff's attorney upon the attorney for the defendant in the judgment. The sureties failed to justify, and on the 14th of September thereafter notice was

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given to the sheriff that the undertaking was not perfected, and the court afterwards denied a motion made by the defendant for leave to the sureties to justify, a copy of which order denying the motion was on the 20th of the same month served upon the sheriff. Notice was also given to the sheriff, that the sureties having failed to justify, he was required to proceed in the execution of the writ. On the 18th of September a new notice of appeal, undertaking, affidavits of justification and certificates of acknowledgment, were filed in the office of the clerk of Kings county, copies of all which papers, with a certificate of such clerk that the same were true copies of the originals, were on the same day served upon the defendant, and the plaintiff also had due notice thereof. No exception was taken to the sureties in the last named undertaking, nor was the last mentioned appeal vacated or set aside. But on the next day thereafter, the plaintiff returned to the attorney for the judgment debtors the copy of the last named undertaking served upon him, with notice that he refused to receive the same. These facts constituted the defense. The circuit judge, sitting without a jury, found that the last mentioned appeal and proceedings operated as a stay of proceedings under the execution, and were a justification and defense to the sheriff for not collecting the money upon the execution. He ordered judgment for the defendant, from which the plaintiff appealed to the general term.

The plaintiff contends that there can be but one appeal, which is taken by the service of the notice of appeal. If the appellant omits to file the undertaking, or the sureties therein fail to justify, the appeal becomes ineffectual to stay the proceedings, but for all other purposes, and especially for the purpose of preventing a new appeal which shall become effectual, the first appeal remains in full force. He takes a distinction between an appeal generally, and an appeal which shall effect the only object and end for which an appeal is taken; that is, to remove the action into the appellate

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court, where it is to be reheard and determined. The plaintiff's theory will be sufficiently stated by reference to the facts of the present case. The defendant served his notice of appeal regularly and in due season. But the sureties omitted to justify and prove their ability to indemnify the plaintiff within the time limited by the code, and the court refused them leave to do so, after the time had elapsed. The plaintiff contends that the defendant cannot discontinue or renew his appeal, with sureties who will justify in due season, and that the first appeal remains a bar and a barrier to all future action of the kind. This theory is not borne out by the provisions of the code. If, in addition to the appeal, it be intended to stay the execution of the judgment, the undertaking must be of the nature and kind provided for in section 335; but if it be a mere appeal, leaving the respondent to proceed to the execution of the judgment, the stipulation of the undertaking must be of another kind, as directed in section 334. But this latter section declares in very emphatic language, that to render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant with at least two sureties, to the effect, &c., or the sum mentioned in the section must be deposited with the clerk. An undertaking upon an appeal shall be of no effect, unless accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. If excepted to, they are to justify within ten days, or the appeal shall be regarded as if no undertaking had been given. (§ 341.)

An appeal without an undertaking amounts to nothing, and accomplishes nothing. For the section requiring an undertaking declares that without it the appeal shall not be effectual for any purpose. An appeal which is not effectual for any purpose is a nullity. It effects nothing. It makes no change whatever in the proceedings, but leaves them in the same condition as they were before the notice of appeal was given. This is too plain for argument. So that when

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the sureties in the undertaking of the 29th July, 1861, failed to justify, and the court, upon motion, refused them permission to justify, the notice of appeal of that date, with all the proceedings connected therewith, fell to the ground, and the parties were remitted to the same condition they were in before the notice was given. The defendants were thus left free to effect and perfect a new appeal, with an undertaking which stayed the execution of the judgment. This, it is not disputed, has been done. In *Langley v. Warner*, (1 Comst. 606,) the defendant Warner had given notice of an appeal, but with a defective undertaking. An application was made for leave to amend the undertaking, which the court of appeals denied, saying that "if the appellant really desires the judgment of this court, he can bring a new appeal."

The judgment should be affirmed.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott*, Justices.]

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WELLS vs. KELSEY.

Although courts have received evidence of the price paid for the identical property or article in suit, as some evidence of its value, yet when a large number of articles are sold in the aggregate for a given sum, the opinion of witnesses as to the value of a part of the articles, will not be received for the purpose of ascertaining the value of the other part, in an action for the conversion of the latter.

APPEAL by the defendant from a judgment at the circuit in favor of the plaintiff for \$923.90 damages and costs, and from a subsequent order made at a special term, denying a motion for a new trial.

Britton & Ely, for the appellant.

Charles Orary, for the respondent.

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By the Court, BROWN, J. The plaintiff claims to be the owner, by purchase from the firm of E. R. Durkee & Co., of two iron boilers, one iron boiler front, certain bolts, anchors, iron bars, a quantity of fire and a quantity of hard brick, and the action is brought to recover the value thereof, upon the ground that the defendant had converted the property to his own use. It was in a building upon Sedgwick street in the city of Brooklyn, of which the plaintiff's vendors were the tenants, and Charles Kelsey, the defendant, the landlord. The term had ended, in pursuance of a stipulation in the lease, by which the destruction of the demised building by fire should have that effect. In the case of *Kelsey v. Durkee*, (33 Barb. 410,) this court, at general term, adjudged that the articles referred to were not fixtures, and were the property of the tenants, and not that of the landlord. The material questions which arose upon the trial of this action, at the Kings county circuit, in October, 1861, when the plaintiff had a verdict, were as to the conversion by the defendant, and as to the value of the property.

In regard to the conversion, the plaintiff, who was examined as a witness, testified that he bought the property from E. R. Durkee & Co. on the 1st of October, 1860, and commenced to move it on the 2d of that month. "I moved the engine and some other machinery connected with it. I then commenced to take down the brick work and part connected with the boilers, and to remove the boilers, and while doing it Mr. Kelsey came in and forbid my doing so. He said they were built in brick work and connected with the building, consequently they were his property. He also said there was an injunction against the removal of them, and if I moved them, it would be at my peril. I then gave directions to the men I had employed to leave them; that we might get ourselves into difficulty. I commenced to move on the 2d, and this might be on the 4th. He said these boilers and brick work and all there, that were connected with and built into the brick work, were his. I told him I had bought them, and

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had a right to remove them. He said if I did so I would make myself liable to prosecution, or something to that effect. He acted rather excited. I went off and left the property."

This evidence was to some extent contradicted by the testimony of Charles Kelsey, the defendant, and of his agent, Stephen Halstead. But there was no conflict as to the presence and interference of Kelsey, at the time referred to by Wells, and that he opposed and forbade the removal of some portion of the property purchased by Wells from E. R. Durkee & Co. There was also evidence from which the jury might have inferred and found the subsequent assent of Kelsey to the removal of the property. The question, however, was fairly left to the jury. They were told by the judge that "a demand and refusal is evidence of a conversion, and nothing more. If the refusal is qualified in any way, the jury must judge whether the qualification, or the reason given for not delivering the property, is a reasonable one. If it is reasonable, then the conversion is not made out, and the action must fail. If Charles Kelsey refused to deliver the property on demand, and afterwards signified to the plaintiff his willingness that he might take it away, before the commencement of the action, then the conversion is not made out." The jury found the fact of the conversion, against the defendant, and their verdict cannot be disturbed.

Upon the subject of the value of the property, a question of evidence occurred, which I will briefly examine. The bill of sale from E. R. Durkee & Co. to Thomas I. Wells, the plaintiff, read in evidence, included a steam engine and various other articles of machinery and tools, besides the property to recover the value of which this action is brought. The price for the whole property was the sum of \$1200, without designating the price of each article separately. Upon the cross-examination of Thomas I. Wells, the defendant's counsel asked him "what the steam engine was worth?" The question was objected to as immaterial and irrelevant. The court sustained the objection and excluded the evidence, and

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the defendant excepted. The steam engine was not the subject of the action. The defendant's counsel then asked the witness the following question : " What was the value of the articles purchased by you not included in this action ?" This question was in like manner objected to, the objection sustained and the defendant excepted. The object of these two questions was to fix the value of the property which was the subject of the action. Assuming the value of the various articles named in the bill to be \$1200, the price therein named, and deducting these from the estimated value of the articles not included in the complaint, would fix, it is thought, necessarily the value of the property claimed by the plaintiff. It was evidence, it is said, from which the jury might infer the value of the property in suit. The courts have received evidence of the price paid for the identical property or article in suit, as some evidence of its value. But when a large number of articles are sold in the aggregate, for a given sum, they have never received, that I can learn, the opinion of witnesses as to the value of a part of the articles, for the purpose of ascertaining the value of the other part. Such a mode of estimating value of property, is open to many objections. It must assume that the price paid for the aggregate property is the true value. It is very far from being so regarded. In *Smith v. Griffith* (3 Hill, 333) the court say : " though the price paid by the plaintiff was not conclusive upon him, as he might have been fortunate enough to buy under the fair market value, yet it is some evidence, and might well have been taken into the account, with the other testimony. It was one of the multitude of sales that in the aggregate might go to determine the market value, at the place where the purchase was made." This was said, it must be observed, of an article having a market value, which second hand steam engines, boilers, pumps, shafting, pulleys, pipes, cocks, tools and machinery have not. In *Campbell v. Woodworth* (20 N. Y. Rep. 499) evidence of the sum for which the identical goods in suit were sold at auction was offered and rejected,

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and in the opinion Judge Denio says : " In such a case as the present, we think that the evidence of what the goods sold for at the auction should have been received for the consideration of the jury, to be compared with the other evidence of value that might be offered, and to be allowed such weight as the circumstances of the sale, and the degree of competition actually exhibited, should entitle it to." All this has reference to the specific property itself, and not to some other property with which it happens to be united and valued, and from which it must finally be separated. The proposition of the defendant was to separate this mass of machinery and tools into two separate parts, and take the opinion of his witness upon that part which was not the subject of the action, for the sole purpose of getting at the value of the part in controversy. And if the inquiry was legitimate and proper to the extent proposed, it would have been equally legitimate and proper to take the opinion of witnesses upon the value of each separate article. No thought is given to the effect which separation might have upon the actual value of the property. It may have been of greater value when sold together than when sold in separate parcels, and it may have been worth less. And it is very evident, from these considerations, that the opinion of the witness upon the value of the property sold by E. R. Durkee & Co. to the plaintiff, and not the subject of the suit, could be of no service to the jury in determining the value of that which was. It might confuse their minds and lead them away from the real question submitted to them, but it could do nothing else.

The judgment should be affirmed.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott, Justices.*]

**FREEMAN and others vs. THE FULTON FIRE INSURANCE
COMPANY.**

It is well settled that at the common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured.

Hence a complaint, in an action on the policy, must contain an averment of such an interest in the plaintiff, or in the person for whose benefit the contract was made, in order to state a cause of action.

Where the person with whom a contract of insurance was made, and who brings an action upon it, has no interest in the property which would authorize or enable him to make such a contract himself, he is bound to state affirmatively, in his complaint, that he acted as the agent of another, whose interest was sufficient to sustain such a contract.

THIS was an appeal from an order made at a special term, overruling the demurrer of the defendants to the complaint. The action was upon a policy of insurance issued by the defendant April 26, 1861, upon the steamer "Cataline," &c., insuring against fire from April 26 to July 26, 1861. The complaint states "that at the time of the issuing of the policy, Charles A. Stetson, jun. was the owner of the 'Cataline.' That in consideration of the payment by the plaintiffs, who thereto were employed by and therein acted as agents of the said Stetson, to the defendants, of the premium of six dollars and eighty-eight cents, the defendants made and issued their policy * * * and delivered it to the plaintiffs, for the account of whom it might concern, by which the defendants insured the plaintiffs, or whom it might concern, against loss or damage by fire to the amount of \$2500, on the steamer 'Cataline,' her hull &c., while running &c., from 26th day of April, 1861, until the 26th day of July, 1861, with privilege of effecting other insurance to the amount of \$17,500, without notice until required; and in and by said policy agreed to pay the loss, if any, to the plaintiffs, under their firm name of 'M. M. Freeman & Co.;" and that said Charles A. Stetson, jun. was, at the time of the issue of said policy, and up to the time of the fire continued to be, the person or party for whom said insurance

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was effected, and whom it concerned." The complaint further stated that at the time of the insurance, and from thence until the fire, Stetson had an interest in said insured property to an amount exceeding the whole amount of insurances, (\$20,000,) and was the owner of the property, the cash value whereof was \$24,000. "That on the 2d day of July, 1861, the said vessel &c. was burned," &c. That Stetson and the plaintiffs had fulfilled all the conditions and requisitions of the policy on their part to be performed; that the plaintiffs had demanded payment of the defendant of said \$2500, which the defendant refused to pay, &c.; wherefore the plaintiffs demanded judgment for \$2500 and interest. The defendant demurred to this complaint, on the ground that it did not contain facts sufficient to constitute a cause of action. The court, at special term, overruled the demurrer, and ordered judgment for the plaintiffs.

John Owen, for the appellant. I. All actions are now to be brought in the name of the real party in interest, (*Code*, § 111,) with an exception in favor of trustees of an express trust, &c. (§ 113.) The plaintiffs do not claim as trustees for Stetson, but in their own right. The rules of equity in relation to parties are adopted by the code, (*Corning v. Greene*, 23 Barb. 44; *Brownson v. Gifford*, 8 How. Pr. R. 395; *Hollenbeck v. Van Valkenburgh*, 5 id. 284; *Secor v. Keller*, 4 Duer, 419;) and in equity a mere nominal party was not allowed to sue. (*Rogers v. Traders' Ins. Co.*, 6 Paige, 598. *Field v. Maghee*, 5 id. 539.)

II. It is absolutely essential, in order to recover upon a policy, that the person insured should have an interest in the property at the time of loss. The contract is one of indemnity, and if the insured is not damaged he cannot recover. (*Murdock v. Chenango Ins. Co.*, 2 N. Y. Rep. 216. *Howard v. Albany Ins. Co.*, 3 Denio, 301. *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 261. *Grosvenor v. Atlantic Ins. Co.*,

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17 N. Y. Rep. 392. *Kernochan v. Bowery Fire Ins. Company, Id.* 442.)

III. It was necessary, even at common law and entirely irrespective of any statute, that the person insured should have an interest in the property in all cases of fire insurance. (*Lynch v. Dalkell*, 3 Bro. P. C. 497. *Sadlers Co. v. Badcock*, 2 Atk. 554. See *Ruse v. Mut. Benefit Ins. Co.*, 23 N. Y. Rep. 523.) A distinction was taken between fire and marine policies, which accounts for some cases which are loosely cited as holding an averment of interest unnecessary. *All these cases*, without a solitary exception, will, on examination, be found to arise upon marine or life policies. And they have all been overruled by the court of appeals, which has just decided that wager policies of every description are void at common law, on grounds of public policy. (*Ruse v. Mut. Benefit Ins. Co.*, 23 N. Y. Rep. 516.) The case here referred to was an action upon a life insurance policy, which was governed by the laws of New Jersey. There being no evidence of any law of that state upon the subject of wagers, the court assumed that the common law prevailed. The plaintiff not proving that he had any interest in the life of the deceased, the court held that he ought to have been nonsuited.

IV. The importance of the fact that an insurance without interest was void at common law, becomes manifest in this case. (1.) It is an undoubted rule that the plaintiff must allege every thing in his complaint which, at common law or in equity, it is necessary for him to prove at the trial. (*Prindle v. Caruthers*, 15 N. Y. Rep. 427. *Bank of U. S. v. Smith*, 11 Wheat. 174. *Safford v. Drew*, 3 Duer, 632. *Underhill v. Saratoga and Wash. R. R. Co.*, 20 Barb. 455. *McKyring v. Bull*, 16 N. Y. Rep. 297.) The cases which hold it unnecessary to allege that a contract was made in writing, &c., proceed upon the ground that acts valid at common law, but regulated by statute, may be pleaded in like manner as before the enactment of the statute. (*Steph. on*

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Plead. 373. *Hilliard v. Austin*, 17 Barb. 141. *Dewey v. Hoag*, 15 *id.* 368. *Stern v. Drinker*, 2 *E. D. Smith*, 406.) Such reasoning is wholly inapplicable to the averment of interest in the subject of fire insurance, it being a necessary element of the cause of action at common law. (2.) The court of appeals has explicitly declared, that in *all* actions upon insurance policies the plaintiff must "aver and prove the interest of the plaintiff. It is an indispensable part of the plaintiff's case, to be made out *affirmatively* at the trial." (23 *N. Y. Rep.* 527.) (3.) The plaintiff is therefore bound to allege in his complaint that he had an interest in the thing insured. (*Ruse v. Mut. Benefit Ins. Co.*, *supra.* *Williams v. Ins. Co. of N. A.*, 9 *How. Pr. B.* 365. *Peabody v. Wash. Ins. Co.*, 20 *Barb.* 339. *Cousins v. Nantes*, 3 *Taunt.* 513.) It is scarcely necessary to dwell further upon this point, inasmuch as the frame of the complaint substantially admits the law to be as here stated, carefully stating Stetson's interest in several places. The point at issue is that which follows :

V. It being settled that for reasons of public policy a wager policy is void, irrespective of the statute, (see point III,) it becomes necessary to inquire whether the same reasons of policy do not forbid that any one should in any way have the benefit of an insurance without an interest in the property. The reason of the rule, as stated in several places, is that it is deemed unsafe to permit any one to have a direct pecuniary advantage to gain by the commission of arson. If this reason is sufficient to prevent A. from recovering on an insurance made for his benefit without interest, why does it not apply with equal force to prevent him from recovering on a policy made by him for account of B., the real owner, with loss payable not to B., nor to A. for the benefit of B., but to A. in his own right and for his own benefit? What is such a proceeding but an evasion of the law? If it is tolerated, the result will be, that all wager policies will be made for account of whom it may concern, and at most, all that would

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be required would be the consent of the owner, which might readily be obtained, as he would not be debarred from insuring the property again in his own name. It is necessary, in order to carry out the policy of the law, that no one should be allowed to gain any advantage by the destruction of property. If any one has an interest in its preservation, he may insure that interest; but he cannot assign his insurance without also assigning his interest to the same person, because, if he could, the assignee would have a direct interest in the destruction of the thing insured. The question, however, does not depend upon argument. The authorities are uniform and explicit that an assignment of the policy, in order to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance. (*Ellis on Ins.* 69. *Marshall on Ins.* 800. *Phillips on Ins.* § 77. 3 *Kent's Com.* 375.) And it has been so settled in our court of appeals. (*Hooper v. Hudson River Ins. Co.*, 17 *N. Y. Rep.* 426. *S. P.*, *Peabody v. Wash. Ins. Co.*, 20 *Barb.* 339, 341.) Judge Pratt, delivering the unanimous opinion of the court, (Denio, J. dissenting upon another point only,) says, (17 *N. Y. Rep.* 426,) "The assignment of the policy, in order to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance to the assignee;" citing authorities. And again he says, (*p.* 427,) that if the assignee "becomes the real party to the contract of insurance," so as to be able to sue in his own name, "it would be necessary that he should be vested with an interest in the property insured, as if he had taken out a new policy in his own name." In like manner Roosevelt, J., in *Kernochan v. The Bowery Ins. Co.*, (17 *N. Y. Rep.* 442,) declares it to be a "principle of public policy, that no man should be allowed to bargain for an advantage to arise from the destruction of life or property," and says that "the contract of insurance is one purely of indemnity."

VI. The assignee or appointee must, under the principle

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stated in the preceding points, have, and *aver* in his complaint, an interest in himself in the thing insured. There are cases, decided under the old practice, which tend to show that at *common law* the person named in the contract might sue, without having any interest, for the benefit of the real party in interest. These cases have, no doubt, misled the plaintiffs. A different rule is established by the code, and an action not only may, but *must*, be brought by and in the name of the *real party in interest*. (§ 111.) And even before the code, it was held in the court of errors that "it must appear" in an action upon a policy made "for whom it may concern," that "the policy was made in behalf of *the persons who claim to recover*." (*Pacific Ins. Co. v. Catlett*, 4 Wend. 79.) All the cases of fire insurance policies, since the code, in which an appointee in like manner with the plaintiffs has been allowed to recover, have been cases in which the appointee was expressly described as *mortgagee*, thus showing a power coupled with an interest. In this case, nothing appears beyond a bare authority to receive the money, if that. Conceding, for a moment, that the plaintiffs have such an authority, on what ground can it be maintained that they thereby acquire a right to sue? It will not be pretended that a clerk authorized to collect debts could sue for them in his own name. But we do not concede that any such authority is shown by the complaint. On the contrary, it contains no allegation of authority *except to pay the premium*. There is no averment of authority to insure; much less of any authority to do so for the benefit of the plaintiffs, who acted as agents, mere brokers, (*Story on Agency*, § 28,) instead of for that of their principal.

VII. It will be argued that the defendant, by issuing the policy to the plaintiffs, admitted its interest in the subject of insurance. The answer is twofold: (1.) The doctrine has no foundation in reason, and it has been expressly overruled by the court of appeals; the court saying, "It is said that the defendants, by issuing the policy upon the representation

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of the plaintiff that he had an interest, have admitted his interest, and that the production of the policy is at least *prima facie* evidence of such interest. *This position cannot be sustained.*" And the plaintiff was required to prove his interest affirmatively. (*Ruse v. Mutual Benefit Ins. Co.*, 23 N. Y. Rep. 516.) (2.) If there was any thing in the point, the plaintiffs have expressly negatived all presumption of interest in them by their complaint, in which they set up Stetson's exclusive interest.

VIII. The case of *Fowler v. New York Indemnity Ins. Co.*, (23 Barb. 143,) upon which the plaintiffs rely, does not aid them. (1.) All it really decides is, that the word "his," prefixed to the description of the thing insured, is a sufficient averment of ownership in the plaintiff. (2.) The remarks of Judge Strong, to the effect that an averment of interest is unnecessary, are not authority, nor can they be sustained on principle. His first remark is, "I am *inclined to think* that a policy of insurance is *prima facie* an admission by the insurers of the title of the assured." Not only does he not positively assert this doctrine, but he does not venture to say that he *thinks* so. He cites no authority for his suggestion, *nor could he*. The doctrine is expressly repudiated by the court of appeals. (23 N. Y. Rep. 527.) He then goes on to say that "hence" it has been held that an averment of interest is unnecessary. For this proposition he cites three cases, one of them having been reversed on error, (3 Taunt. 513,) though he did not know it, *none* of them based upon the argument to which he refers by the word "hence," and *all* of them being cases of marine insurances, which we have shown were governed by a distinct class of rules, and in which wager policies were assumed to be valid at common law. Finally, the illustrations drawn by the learned judge from the statute of frauds were wholly inapplicable, because a wager fire policy was void at common law, (see point III,) and there never was any doubt that a complaint must allege all the facts which at common law were essential to a recovery.

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IX. If the plaintiffs sue as agents for Stetson, the owner of the property insured, they ought to state the fact in their complaint. An agent sues as a trustee, (*Code*, § 113; *Considerant v. Brisbane*, 22 *N. Y. Rep.* 389,) and stands on the same footing with executors, administrators, receivers, &c. He sues in the right of another. And therefore, in order to conclude that other (his principal) on the record, he must allege his agency, and seek relief in his representative capacity; otherwise the suit must be taken to be his own. On this principle, executors &c. are required to allege that they sue *as such*. And unless they thus sue in their representative capacity, they are not allowed to recover any thing due to them in that capacity, and their complaints, thus inconsistent, are demurrable. (*Gould v. Glass*, 19 *Barb.* 185. *Sheldon v. Hoy*, 11 *How. Pr. R.* 14. *Ogdensburgh Bank v. Van Renselaer*, 6 *Hill*, 241. *Henshall v. Roberts*, 5 *East*, 151.) If agents are allowed to sue as trustees, the same rule must be applied to them.

X. The complaint nowhere shows that the plaintiffs were agents for Stetson, except for the single purpose of procuring the insurance and paying the premium. The loss was not payable to them as agents of Stetson, or "whom it might concern," but to them *eo nomine*. They are not described in the policy as agents; and therefore this case is clearly distinguishable from the case of *Considerant v. Brisbane*, (22 *N. Y. Rep.* 389,) where the contract was made by the agent, and the promise was made to him as such; and it is only upon these special facts, bringing the case within the very words of section 113 of the code, that the plaintiff there was held authorized to maintain the action. (*See opin. of Wright*, J. 392.) And it is submitted, in view of the weight of dissenting authority in that case, that the doctrine there established will not be extended beyond the very facts of that case.

XI. Freeman & Co., according to the facts they set out in their complaint, were merely brokers. They were, as they say, "employed by Stetson, and acted as his agents, to pay

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the premium," and nothing more; which, by any freeness of construction, cannot be held to imply an agency to do more than *procure the insurance*, which, by Story's definition, constituted them simply brokers. *Story, on Agency* (§ 28) says: "The true definition of a broker seems to be, an agent employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation commonly called brokerage," and recites also with approval the language of Lord Ch. J. Tindal, as follows: "A broker is one who makes a bargain for another," &c.; and Story goes on to say, "Properly speaking, a broker is a mere negotiator between other parties, and he never acts in his own name, but in the names of those who employ him." If then Freeman & Co. were merely brokers to procure this insurance, they had no power to effect an insurance in their own name, much less to make the loss payable to themselves.

XII. It is not alleged that the loss was payable to them as *agents of Stetson*, or that they act as his agents in demanding the money or in bringing this action. They nowhere designate themselves as agents, but allege that by reason of the premises the defendant is indebted to them in the sum, &c., and demand judgment. It may be true that Stetson employed them to effect this insurance for whom it might concern, and that it did concern Stetson. If so, Stetson has the right of action against the defendant. And inasmuch as it nowhere appears that Freeman & Co. have the authority from Stetson to demand the money or bring this action, if Freeman can recover, *non constat*, Stetson can also bring his action and recover; because this action, if not by authority of Stetson and for his benefit, (which nowhere appears,) is no bar to an action by Stetson himself. It is in this view that this case differs from *Considerant v. Brisbane*. There the contract was *expressly with the agent as such*, and the contract which would be the basis of the action by Considerant's principals would be evidence of the agency, and estop them from denying his authority to bring the action;

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while, in this case, all that appears in the policy or in the complaint is not inconsistent with the idea that Freeman & Co. were only the brokers to effect the insurance for whom it might concern, and when the loss occurred, then the person for whom it did concern (which the complaint alleges was Stetson) could bring the action.

XIII. To sustain this action by Freeman & Co., it is clearly (as I submit) necessary that they should allege that they are the agents of Stetson and authorized (either as ships' husbands, consignees, factors or otherwise) to effect and recover this insurance in their own name, and that they *as such agents* are the parties whom it did concern, and that this action is for account of Stetson. (*See Myers v. Machado*, 6 Abb. 198.)

XIV. The meaning of the clause, "do insure Freeman & Co. or whom it may concern," is that they insure "Freeman & Co." if it should concern them, and if not, then whom it should concern; and the loss being made payable to Freeman & Co., could have no valid effect, unless Freeman & Co. had an interest either as agents or otherwise, which is not alleged. *Minturn v. Main*, (3 Seld. 224,) and 1 *Chitty's Pl.* pl. 7, are direct authorities, that "where a party acts as a mere agent or servant, a special, beneficial interest must be proven, to maintain an action."

Henry Nicoll, for the respondents. I. By the terms of the policy of insurance, the defendant expressly undertakes, in case of loss, to pay the same to the plaintiffs. At the common law this would be held to be a contract with the plaintiffs, upon which they would be entitled to bring an action in their own name, although the beneficial interest in the subject matter of the contract might be in another. (*Harp v. Osgood*, 2 Hill, 216. *Sargent v. Morris*, 3 Barn. & Ald. 277. *Ennis v. Harmony Ins. Co.*, 3 Bosw. 516. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. Rep. 391. *Considerant v. Brisbane*, 22 id. 389. *Bridge v. Niagara Ins. Co.*, 1 Hall, 246.)

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II. It is wholly immaterial to the plaintiffs' right of recovery whether they have an interest or not in the property insured under the policy; it is sufficient if the parties for whose benefit, as owners of the vessel, the policy was taken out, had such interest at the time of loss. This would be held to be so in the case of an assignment of a policy by the party insured to a third person; *a fortiori*, must this be so where in the contract itself the defendant expressly undertakes, in case of loss, to pay the same to another. Policies of insurance taken out in the names of brokers, factors or trustees, have always been held valid, and as capable of being enforced by them if the parties beneficially interested in the policy have sustained a loss. (*See the cases cited to the last point; Angell on Fire Ins.* 114, § 73; *Burke v. Chesapeake Ins. Co.*, 1 *Peters*, 163; *DeForest v. Fulton Fire Ins. Co.*, 1 *Hall*, 84; *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.* 143.)

III. In stating a cause of action upon a policy of insurance, no averment of an interest in the assured is necessary. But for the statute against wagers, a policy of insurance, without interest, would be a valid contract. By that statute, only such policies of insurance as are not made for the indemnity or security of a party are declared void. It will not be presumed or intended that a contract valid at common law is within the provisions of a prohibitory statute, it being open to the defendant to insist upon and show that it is so by allegation and proof. (*Fowler v. N. Y. Indemnity Ins. Co.*, *supra*. *Dykers v. Townsend*, *Court of Appeals*, Dec. 1861.)

IV. Independently of the question of interest, the plaintiffs, within the terms of sections 111 and 113 of the code, are clearly trustees of an express trust, being persons with whom and in whose name the contract was made for the benefit of those who are interested in the loss as owners of the vessel, and as such, are entitled to bring the action. (*Con-*

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siderant v. Brisbane, 22 N. Y. Rep. 389. *Grinnell v. Schmidt*, 2 Sandf. S. C. R. 706.)

By the Court, EMOTT, J. If the case of *Fowler v. The New York Indemnity Insurance Company* (23 Barb. 143) decided that an averment of interest in the assured is unnecessary in a fire policy, it cannot be sustained. The cases to which Judge Strong refers to sustain his remarks to that effect will be found, all of them, to be cases of marine insurance. In such cases an averment of interest was unnecessary, for such policies might be valid as wager policies where the plaintiff had in fact no interest in the subject assured. Of course, neither an averment nor proof of interest could be required to sustain a recovery on such a policy. (*See Buchanan v. Ocean Ins. Co.*, 6 Cowen, 318.) If a complaint on a policy of fire insurance without an averment of an interest in the plaintiff in the subject of the insurance could be sustained, it must be either because no interest in the property assured is requisite to uphold a policy of insurance against fire, which certainly is not the case under the present statute against wager policies, or because a policy of that description would be valid at common law, and would only be defeated by the statute. This latter view was urged with ability by the plaintiffs' counsel on the present argument. If it were true that wager policies of fire insurance or policies of insurance against fire, where the insured had no interest in the property insured, would be valid were it not for the statute, there would be force in his argument that no interest need be averred for the plaintiff in declaring on them, but the want of such an interest must be pleaded against them. Where a contract is valid at common law, but is forbidden by a positive statute only, it may not be necessary for a plaintiff in declaring upon it to negative the statute, or to aver that the case is not within its prohibition. It is unnecessary, however, to consider how far this is the rule of pleading, or how far the present case would be controlled by

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such a rule, since the premise upon which the whole argument rests, to wit, that a contract of insurance against fire would be valid at common law, although the assured had no interest in the premises, cannot be sustained. In *Ruse v. The Mutual Benefit Life Insurance Company*, (23 N. Y. Rep. 516,) it was held by the court of appeals that a policy of insurance upon the life of another, obtained by one who has no interest in the life, is void at common law. The same rule must apply to fire policies, and indeed in the case I have just referred to, Judge Selden shows that such is the rule recognized by authority, and that the contrary statements in some cases which have misled even judges as well as text writers and makers of digests, (see for instance *Abbott's N. Y. Dig. vol. 3, p. 414*,) are all made in reference to marine policies. The cases do recognize an exception in the case of policies of marine insurance, although the reason for the exception is not apparent, and its extent is confined to this class of insurances. It must be considered well settled at present that at the common law, as well as under the statute of betting and gaming, (1 R. S. 662, § 8,) a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action.

The present complaint states no such interest in the plaintiffs; but it is contended that the action may be supported by them upon the averment which it contains, of the interest of Charles Stetson, under the provisions of sections 111 and 113 of the code. In the case of *Considerant v. Brisbane*, (22 N. Y. Rep. 389,) the court of appeals held that where a contract was made containing a promise to pay A. B. "as executive agent" of C. D., A. B. might maintain an action upon the promise, although the consideration moved wholly from C. D., and A. B. had no interest in the contract. A person who is described or who describes himself as the agent

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of another in making a contract for the benefit of such other person, and in which the latter alone is interested, according to the reasoning in the case of *Considerant v. Brisbane*, falls within that class of persons who by the 113th section of the code shall be construed to be trustees of express trusts. He is a person with whom or in whose name a contract is made for the benefit of another. We are now to see whether this rule will include such a case as is stated by this complaint.

We have seen that the plaintiffs cannot maintain an action upon this policy of insurance, if made for their own benefit, for the want of interest in the subject matter insured. It follows, as a corollary from this conclusion applied to the facts which appear in the complaint, that the only person by whom or for whose benefit a valid policy of insurance upon this steamboat could have been effected was Charles A. Stetson. The question therefore is, does this complaint show a valid contract made with the plaintiffs, or in their name, for the benefit of Charles A. Stetson. The policy of insurance is alleged to have been delivered to the plaintiffs "for the account of whom it may concern," and the defendant is stated by its contract to have insured the plaintiffs, "or whom it might concern." It is also averred that Charles A. Stetson was at the time of the issue of said policy, and up to the time of the fire, continued to be the person or party for whom said insurance was effected and whom it concerned. It will be observed that the policy was not made to the plaintiffs for or on behalf of, or as agents or trustees for, whom it might concern. Taking the other allegations that Charles A. Stetson was the person or party whom it concerned, it might follow that this was a contract with or an insurance of Charles A. Stetson. Then the question would arise whether Stetson himself could sue upon such a contract. But in so far as this policy or contract was with the plaintiffs, it is not stated and does not appear that they were or acted as the agents of Charles A. Stetson. The loss, if any, was made payable by the policy to the plaintiffs; not as

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agents or trustees of Stetson or whom it should concern, but in their individual character. The premium was paid by the plaintiffs, who are alleged thereto—that is, in respect to such payment—to have been employed by and therein to have acted as the agents of the said Stetson. But there is no allegation that the plaintiffs made the contract as agents of Stetson, or that the insurance money was payable to them in that character. The allegation of agency is confined to the single act of paying the premium. Under the case of *Considerant v. Brisbane*, if the plaintiffs procured the insurance as the agents or for the benefit of Stetson, that fact should have been stated, and the further question would then have arisen, whether parol proof of such a trust or agency could be given when it was not disclosed or stated in the written contract. But the present complaint is, in my opinion, defective for the want of any positive and issuable averment of such a trust or agency. It does not appear whether the insurance was made or is to be enforced for the benefit of the plaintiffs individually or by them as trustees for Stetson. Assuming that the latter state of facts may be true, that it is not inconsistent with the facts stated, yet it does not positively appear to be the truth. Where the person with whom the contract was made, and who brings an action upon it, has no interest in the property which would authorize or enable him to make such a contract himself, he is bound to state affirmatively that he acted as the agent of another whose interest was sufficient to sustain such a contract. The allegations of this complaint leave it, to say the least, in uncertainty, whether this contract was made by the plaintiffs for themselves or for the benefit of another. If it was made on their own account, they should have had and should have averred an insurable interest in themselves. If for Stetson, that should have been positively stated. They should have alleged that the policy was made to and with them for the benefit of Stetson, and as his agents or trustees.

I am of opinion that the present complaint is defective;

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that it does not state a cause of action either in the plaintiffs individually or as trustees of an express trust, and that the demurrer should have been allowed.

This judgment should therefore be reversed, and judgment entered for the defendant on the demurrer, with leave to the plaintiffs to amend on the ordinary terms.

All the judges concurred.

Judgment reversed.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scruggam* and *Lott*, Justices.]

MURPHY vs. BALL and others.

Where A., owing money for services rendered by B., who is in the employ of C., pays the money to C., for such services, as if the latter were entitled to compensation therefor, instead of B., the receipt of the money by C., under such circumstances, while it does not prejudice B.'s right of recovery against A., if he have any, will not make the money B.'s, nor entitle him to maintain an action against C., for money had and received by C. from A. for the plaintiff's use and benefit.

APPEAL from a judgment rendered on the verdict of a jury, after a trial at the circuit. The plaintiff was a night watchman, and watched the defendants' store for several years (from 1856 to 1861) at \$2 per night, for which he received his pay periodically. During two years of this time (from 1858 to 1860) he also watched the building of the Importers and Traders' Bank, adjoining that of the defendants. This he testified he did on the separate employment of the bank, for which the bank was to pay him, though the compensation was never fixed. The defendants proved that they employed the plaintiff to watch the bank; that he agreed to do so without increased compensation, beyond such presents as the bank might make him; and that by arrangement with the bank, the bank was to pay them part of this expense of

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watching, to wit, \$5 per week. This was the main dispute of fact, and the only one submitted to the jury. This \$5 per week, amounting for the two years to \$520, the bank paid to the defendants, and this action was brought to recover the amount, as money had and received to his use. The same witness by whom the receipt of the money by the defendants was proved, proved also that it was paid by the bank and received by the defendants as their money, under the arrangement above stated. The plaintiff testified that he never authorized the bank to pay the defendants for his services, nor the defendants to receive pay for them, and that they have always refused to pay the money received by them to him, claiming it as their own. Under this state of facts the defendants moved for a nonsuit, which motion was overruled, and the defendants excepted. The jury rendered a verdict in favor of the plaintiff for \$520, and the defendants appealed.

S. P. Nash, for the appellants. The plaintiff's right of action, if any, was against the bank. He established no payment of money by the bank for his use, no reception of money by them for his use, no promise, express or implied, by the defendants to pay him any part of the money received from the bank, and no claim to the specific money they received.

I. In considering the cases in reference to the action for money had and received, there is one distinct class to be excluded from the present inquiry, viz. cases where the claim is for specific moneys, or for money the proceeds of property, to which the plaintiff establishes a *title*. Where A. owns money or property in the hands of B. he can follow it, or its proceeds, so long as he can trace them; or, if A. be a creditor, and B. has property in his own hands, or in the hands of C., which he *appropriates* to the payment of his debt to A., A. becoming the owner of the property may claim its proceeds wherever he can find them, and by his own election constitute the holder his trustee, and sue him for money had and

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received to his use. Such are the cases of *Berly v. Taylor*, (5 *Hill*, 577,) and *Cobb v. Dows*, (6 *Seld.* 335.) In cases of this character the proposition can hardly be stated too broadly, that if the defendant has money to which the plaintiff can make a *title*, as having been his originally, or become so by specific deposit to his use, or as being the proceeds of property to which he had the title, the plaintiff can sustain an action for money had and received. (*Cobb v. Dows*, *supra*. *Marsh v. Keating*, 1 *Bing. N. C.* 198.)

II. This class of cases does not govern the class to which the case at bar belongs; cases where the plaintiff never owned the property or money in question, but where he claims a right to it growing out of *contract*, express or implied. If A. has a deposit in bank belonging to him, and gives his creditor B. a check upon it, B. obtains no right to the fund by the mere delivery of the check; but if A., having money of B. in his hands, should deposit it in bank for the use of B., B. might have a right at once to consider the fund as his own; so if A. should deposit money of his own specifically to the use of B., or should appropriate the whole of a specific deposit. (See *Winter v. Drury*, 1 *Seld.* 525; *Chapman v. White*, 2 *id.* 412; *Mandeville v. Welch*, 5 *Wheat.* 286.) This illustration exhibits the three points that the plaintiff must establish to maintain an action for money had and received, where his claim arises out of *contract*, and not out of *title*. *First*. That the original owner paid over the money to the defendant to be appropriated to the plaintiff's use. *Second*. That the defendant received it for the purpose of paying it over. *Third*. That the creditor assented to such mode of payment. (1.) In every case that I have been able to find, there existed the first element above stated, viz. that the original debtor, owner of the money, paid it over to be appropriated to the plaintiff's claim, and in most of the cases the appropriation was express. In some it has been held that the original debtor might withdraw the money or property so appropriated, at any time before notice of the appro-

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priation given to the creditor, as will be subsequently seen. In *Murdoch v. Aikin*, (29 Barb. 59,) however, where money had been collected, and placed in the hands of town officers, to meet the interest on bonds issued by the town, it was held the appropriation was final, on the ground that the town had lost the right to give the money any other direction. In *Vaughan v. Matthews*, 13 Q. B., (*Adol. & El. N. S.*, 66 Eng. C. L. 187,) the plaintiff was nonsuited because this element did not exist. (See *Hawkins v. Stark*, 19 John. 305; *Dodge v. Lean*, 13 id. 508; *Lawrence v. Fox*, 20 N. Y. Rep. 268.) (2.) The second requirement runs, generally, along with the first. If A. pays over money to B. for a specific purpose, B.'s receiving it at all is, ordinarily, evidence that he received it for that purpose. But there are cases in which it has been held that he may set up independent and adverse claims to the fund. (*Tiernan v. Jackson*, 5 Pet. 580. 2 Story's Eq. §§ 1041-1047. *Seaman v. Whitney*, 24 Wend. 260. *Yale v. Bell*, 3 Barn. & Cres. 683.) (3.) The third requirement above stated is of little consequence in this case, any further than it illustrates the general doctrine. The theory of the rule seems to be, that until the party for whose benefit the money is paid over has notice of the provision and assents to it, the matter is entirely between the depositor and the depository, and the former may recall his money, as it still remains his, and at his risk. (See *Seaman v. Whitney*, 24 Wend. 260; *Williams v. Everett*, 14 East, 582; 2 Story's Eq., *ub. sup.*; *Dey v. Murray*, 9 John. 171.)

III. In the case at bar, whatever else may be said of it, it cannot be said that there is any evidence whatever that the bank paid over the money in question to the defendants, on account of any debt the bank owed the plaintiff. There is no evidence that the bank acknowledged any indebtedness to him, and it is quite clear that the defendants received no money to pay any such indebtedness. The plaintiff's remedy is against the bank, and there was not the slightest excuse for his resorting to the defendants.

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Britton & Ely, for the plaintiff. I. The jury, by their verdict, found, necessarily under the charge, that the plaintiff did not agree with the defendants that he would watch the bank without additional compensation. They had a right to find from the testimony that it was expressly agreed between the plaintiff and defendants that whatever the bank paid, the plaintiff was to receive. If the witness, Good, is to be believed, in watching the bank, the duty of the plaintiff was manifestly twofold in its character. He was to watch the bank on account of the defendants, for the greater security of their building, and also on account of the bank itself. This he did with the assent of the defendants, and in fact by agreement with them. The jury had a right to find, from the evidence, that there was an express agreement, not only by the plaintiff with the bank, but also with the defendants, that he was to receive whatever the bank would pay for services rendered them. The words "as a present," qualifying the words "if the bank choose to *pay* you any thing," he not then having disclosed to the plaintiff the fact that any arrangement had been made by the defendants with the bank, do not imply that it was not understood rightly from the language that whatever the bank would give, the plaintiff should receive. In this view of the evidence we have the defendants in possession of money received from the bank, which both the defendants and the bank had agreed should belong to the plaintiff. The law will in such a case imply the obligation on the part of the defendants to pay over to the plaintiff, on which an action can be maintained.

II. If the pleadings are informal or defective after verdict, the court will, in furtherance of justice, conform the pleadings to the facts. (6 *Duer*, 182. *Code*, § 169.)

III. But if the bank paid this money to the defendants, intending it as the money which the bank had agreed to pay the plaintiff, and the plaintiff had not agreed with the defendants that they were to have it, then this action can be sustained. The defendants object that there is no privity

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between the plaintiff and the defendants, and that there is no trust. Neither is necessary, to maintain the action. (*Lawrence v. Fox*, 20 N. Y. Rep. 268.)

By the Court, EMOTT, J. The plaintiff was in the employ of the defendants, as night watchman, at a stipulated compensation. In December, 1857, he commenced, and for two years thereafter continued, to watch also the premises of the Importers and Traders' Bank, which at that time adjoined the store of the defendants. The additional services which he thus performed might have been rendered under his original contract with the defendants. In that event he would not have been entitled to any additional compensation from any one, and any money or pay which the defendants obtained for his services would have belonged to them, because these services would have been entirely and exclusively their property. His additional services, again, might have been rendered under a new employment by the defendants, by which he was to receive additional compensation from them for watching the banking house, as a farther service rendered to them or at their request. If this were so, it would not sustain the present action, which is not brought for money earned by or due to the plaintiff from the defendants for such additional services, but for money received by the defendants from the bank to the use and benefit of the plaintiff. It may be added, that the evidence expressly negatives the supposition that the defendants agreed to pay the plaintiff any new or farther compensation for his additional services in watching the adjoining bank. A third supposition in regard to the plaintiff's employment and service, would be that he was expressly employed by the Importers and Traders' Bank to watch their premises in addition to the premises of the defendants, and that for this the bank was to pay him a compensation farther than what he was already receiving as the watchman of the defendants. This last supposition of facts as to the employment and services of the plaintiff must be

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assumed or established as a preliminary to such an action as the present, and probably there is evidence upon which the jury might have come to such a conclusion. But this alone will not sustain the present action. An employment of the plaintiff by the bank, and an agreement to pay him a stated or a suitable compensation, would of course enable him to bring an action against the bank for such compensation. To such an action, provided the services were rendered, the bank could have no defense but payment. It may not be necessary to assert that this action cannot be maintained, unless the payment by the bank to the defendants operated as a payment to the plaintiff; but the mere facts that the bank was liable to pay the plaintiff for his services, and that they paid the defendants a sum of money for those services, would no more sustain the plaintiff in this action, than they would defend the bank in a suit against it by the plaintiff. The witness Good, who is in the employ of the defendants, testified that the defendants received \$520 from the Importers and Traders' Bank for the watching of their building, \$260 in January, 1860, and \$260 in January, 1861, being at the rate of \$5 per week for two years. It is not claimed or pretended that the plaintiff authorized or requested the defendants to collect or receive this money for him. He did not even know that it had been paid, until long afterwards. Nor is there any evidence that the bank paid the money to the defendants for the benefit of the plaintiff, or intending thus to discharge an indebtedness to him. As little proof is there that the defendants understood that this money was paid to them for the plaintiff, or accepted it as belonging to him. In truth, the case stands simply upon the allegation that the bank owed the plaintiff for certain services, and that it chose to pay a third person for these services of the plaintiff. Indeed, the payment was made to the defendants, as if they were entitled to control the services of the plaintiff, and as if they and not the plaintiff were entitled to compensation for them. The money was neither paid to them nor received by them

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to the plaintiff's use, and its receipt under such circumstances, while it does not prejudice the plaintiff's right of recovery against the bank, if he have any, did not make the money his, or entitle him to claim it from the defendants, or to maintain the present action against them.

The judgment must be reversed, and a new trial ordered.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott, Justices.*]

THE PEOPLE, *ex rel.* Ward and others, *vs.* KELSEY.

A pier erected in a navigable river, is within the meaning of the statute concerning summary proceedings to recover the possession of lands, which relates to the tenants of any houses, lands or tenements.

The word "tenement" signifies every thing which may be holden, if it be of a permanent nature; and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself.

What amounts to a *lease*, which will create the relation of landlord and tenant, between the parties.

When the state makes a grant of land covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the surface of the water, in the form of a wharf, it is not a mere *franchise* to collect wharfage, and belonging to the public at large for commercial purposes, but the grantee is invested with all the rights that pertain to the ownership of lands.

Whenever the relation of landlord and tenant is made out, in summary proceedings to recover the possession of the demised premises, the tenant is estopped from disputing the title of his landlord.

The failure of the lessor to construct a pier in conformity with the stipulations of the agreement, though it may constitute a good defense to an action upon the lease, to recover the rent, is no defense or answer to the claim of the landlord to have the possession restored to him.

Where tenants have taken possession of the demised premises, under the lease, and have thus become vested with the term, they cannot refuse to pay the rent, and at the same time retain the possession and enjoyment of the premises, against the claim of the landlord.

They have their election to pay the rent, or restore the possession when demanded. They cannot withhold both the rent and the possession.

In summary proceedings to recover the possession of lands, it is right and proper for the judge to charge the jury, upon the law of the case.

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CERTIORARI to review proceedings had before the city judge of Brooklyn, under the statute relative to summary proceedings to recover the possession of lands.

Charles Kelsey, by lease bearing date September 27, 1858, let and rented to Robert M. Ward and Walter S. Gove certain storehouses and a pier at the foot of Sedgwick street in the city of Brooklyn, together with all his right, title and interest to the water in front thereof. On the 9th day of June, 1859, he by an agreement in writing agreed to build in a certain manner and let to the said Robert M. Ward and Walter S. Gove and one Edward P. Morris a structure to be built alongside the pier aforesaid, called an "addition to the pier," and they agreed to and did hire the same from him, at the rent of \$1700 per annum. Ward, Gove and Morris entered into possession of the same on the 1st day of January, 1860, it being then finished, and they continued to occupy it until January, 1862, when, no rent having been paid, summary proceedings were instituted because of non-payment of rent for the year 1861, before Hon. George G. Reynolds, city judge of Brooklyn, and a jury, which resulted in a warrant, under which the tenants were dispossessed.

S. Sanxay, for the relators.

Britton & Ely, for the defendant.

By the Court, BROWN, J. On the 27th of September, 1858, Robert M. Ward and Walter S. Gove, two of the relators, by a lease of that date, became the tenants of the defendant, Charles Kelsey, of certain storehouses and a pier at the foot of Sedgwick street in the city of Brooklyn, together with all Kelsey's right and title to the water in front thereof. The term was for ten years from the 1st of February, 1859, at an annual rent of \$10,000. They entered into possession of the demised premises, and have so remained in possession since the commencement of the term. On the 9th day of June, 1859, Kelsey, by another

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agreement in writing made with Robert M. Ward, Walter S. Gove and Edward P. Morris, the relators in the proceeding, bearing date on that day, agreed to build an addition of 30 feet in width to the pier, beginning with said addition, 40 feet out from the bulkhead and extending out to the outer end of the pier. He was to complete the same before the 1st of January thereafter. Ward, Gove and Morris agreed to pay to Kelsey the sum of \$1700 per annum as rental for such addition, from the time of the completion of such addition to the end and termination of the lease before mentioned to Robert M. Ward and Walter S. Gove. The agreement then proceeded in the following words: "Said Kelsey agrees to let, and by these presents does let, unto said Ward, Gove and Morris, the said addition to the pier (in consideration of the rental above stipulated) from the time of its completion to the end and termination of the lease of the present pier. And said Kelsey agrees to build a good and substantial addition to the pier as regards strength and good material."

The construction of the pier, the entry of Ward, Gove and Morris upon the demised premises, and their occupation by them, the rent in arrear, and the holding over without the permission of Charles Kelsey after demand and default in the payment of the rent, are facts found affirmatively by the jury, as appears by the return of the city judge of Brooklyn to the writ of certiorari, and are to be taken as true, for all the purposes of this examination and decision.

The first objection taken to the regularity of the proceedings before the city judge of Brooklyn is, that he acquired no jurisdiction to act in the matter, because the statute in respect to summary proceedings to recover the possession of lands relates to the tenants of any houses, lands or tenements, and that a pier erected in a navigable river is not within the meaning of either of these terms. Hereditament would have been a more comprehensive term. But few persons, I think, would entertain any doubt that a pier of ground

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reclaimed from tide water by embankment, or by raising the bottom by filling with stone, earth or other material, in the manner in which piers and wharves are constructed above the surface of the water, would be regarded as land. Where the reclamation is permanent and durable, what is it if it is not land? Be that as it may, the word tenement signifies every thing which may be holden, if it be of a permanent nature; and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself.

It is also objected that the written instrument of the 9th June, 1859, is not a lease, and did not create between Kelsey, and Ward, Gove and Morris, the relation of landlord and tenant. We are to look at the intention of the parties. The instrument is not an agreement for a lease to be executed at a future time. It contemplated no new instrument. The premises demised were to be fitted for the use of the tenants and in part created, for the pier was to be created and raised above the waters of the river or bay, so that it might be fitted for human occupation. But when completed, the instrument took effect as a lease. The words used are words of present demise. "Kelsey agrees to let, and by these presents does let, unto said Ward, Gove and Morris the said addition to the pier," reserving rent. As soon as Ward, Gove and Morris entered upon the pier and took it into their possession the relation of landlord and tenant commenced, and existed at the time the summary proceedings were instituted. The agreement was not a grant of the right to take wharfage, which is an incorporeal right, but it was a lease of corporeal property for a term of years, carrying with it the right of occupation and enjoyment. The counsel for the relator argues that a wharf is a mere franchise to collect wharfage; that it belongs to the public at large for commercial purposes, and there is no element of property in it but the franchise to collect wharfage. This certainly is novel doctrine. The people of the state in their right of sovereignty are deemed to possess the original and ultimate property in and

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to all the lands within the jurisdiction of the state, lands above as well as below tide water. And may, through the legislative power, grant to private uses the one as well as the other. The state makes a grant of land covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the surface of the water. Why shall he not be invested with all the rights that pertain to the ownership of lands. The title of Charles Kelsey to the pier cannot, however, become the subject of inquiry here. Whenever the relation of landlord and tenant is made out, in summary proceedings to recover the possession of the demised premises, certainly the tenant is estopped from disputing the title of his landlord. (*Jackson v. Smith*, 7 Cowen, 717. *Jackson v. Spear*, 7 Wend. 401. *Ingraham v. Baldwin*, 5 Seld. 45.)

The counsel for the relators, upon the hearing, offered to show that the addition to the pier was not built by the defendant in a good and substantial manner, equal in any respect to the old pier as regards strength and good material. This evidence was objected to by the counsel for the landlord, and the objection sustained by the judge. The relators excepted to the decision. The failure to construct the pier in conformity with the stipulations of the agreement might have constituted a good defense to an action upon the lease to recover the rent. But it is no defense or answer to the claim of the landlord to have the possession restored to him. One of the questions of fact submitted to and affirmed by the jury is, that the tenants took possession of the demised premises, under the lease. They thus became vested with the term. They cannot now refuse to pay the rent, and at the same time retain the possession and enjoyment of the premises, against the claim of the landlord. They have their election to pay the rent or restore the possession when demanded. They cannot withhold both the rent and the possession. (*Lafarge v. Mansfield*, 31 Barb. 345. *Dingan v. Hogan*, 16 How. Pr. Rep. 164.)

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When the evidence was closed and the questions involved were about to be submitted to the jury, the judge proceeded to charge them upon the law of the case. Whereupon the counsel for the tenants objected that there was no legal right vested in the magistrate, in summary proceedings, to charge the jury. Several questions of law arose in the progress of the trial, with which it cannot be supposed the jury were conversant, and which it was of some consequence they should rightly comprehend before they could act intelligently and sensibly. The defendant insists that they were not to obtain a knowledge of the law from the judge, and that whatever he said in respect thereto, however just and true, was an error for which this court should reverse the proceedings. This is a most extraordinary proposition. There is no express authority and direction contained in the statute concerning summary proceedings to recover the possession of lands, (2 R. S. 417,) that the judge shall instruct the jury upon the law. Nor is there any express words authorizing him to swear the witnesses, or to say what is to be received as evidence and what not, nor even to preserve order and decorum during the trial. Yet no one would think of disputing his authority to do all these things. Without it the trial could not proceed, and the remedies provided by the act could not be obtained. All these powers, as well as that to instruct the jury, are to be implied. Where the facts upon which the summons was issued are denied by an affidavit, the matters controverted are to be tried by the magistrate or by a jury, provided either party at the proper time demands a jury. (§ 34.) The matters controverted are those facts upon which the summons was issued and denied by the affidavit of the person in possession of the premises. The legal questions are still, however, to be determined, as all such issues are constantly determined, by the judge holding the court or conducting the proceedings. There is to be trial by a jury. Trial is the examination of the matter of fact in issue. "Trial by jury, called also trial *per pais* or by the country, a trial which

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hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof." (3 *Black. Com.* 349.) This commentator then proceeds to describe how the jury are to be summoned and selected, how the testimony is to be received and the witnesses examined, &c. and says: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury, omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."

When our statutes speak of trial by jury, they mean a trial conducted in the manner described by the English commentator. Jurists and lawyers have no conception of a well conducted trial by jury, in which the charge of the judge upon the law of the case is omitted.

Numerous other questions were raised upon the hearing, which I decline to consider.

The proceedings should be affirmed, with costs.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scruggs* and *Lott*, Justices.]

APPLEY vs. THE TRUSTEES OF MONTAUK.

The act of the legislature of April 2, 1852, to incorporate the proprietors of Montauk lands, in the town of East Hampton, in Suffolk county, does not vest the trustees with the title, or give them the possession, of the lands. Nor does it empower the trustees to sell the grass or herbage growing thereon, or to enter into contracts of agistment, which shall bind the corporation.

And where, in an action against the trustees, as bailees or agisters, to recover the value of a horse which had been pastured on the common lands, and was alleged to have been mired and killed in consequence of the carelessness

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and negligence of the defendants, it appeared that the trustees had no rights of pasturage to sell or dispose of, and no right to enter into any contract in regard thereto; and that the contract for the pasturage was made not with them, but with the owners of the pasture rights in the land; it was held the action would not lie against the trustees.

THIS was an action brought by the plaintiff to recover the value of a mare, which the complaint alleged that the plaintiff placed with the defendants to pasture, and which was mired and lost, through their carelessness and neglect. The action was tried at the Suffolk circuit, before a jury, in June, 1861. At the close of the testimony, on the part of the plaintiff, the defendants moved for a nonsuit, on the ground that the action should be brought against the person from whom the plaintiff hired his right; that the contract was between them; that the proprietors were tenants in common, and that the trustees did not receive any consideration for such hiring; that the act of incorporation was merely to regulate the right of pasturage as between themselves, and did not divest the owners of their title; that no relation of master and servant existed between the trustees and keepers. The counsel for the plaintiff contended that though by the act of incorporation the title of the proprietors remained undisputed, yet the exclusive control and management of the land, and the entire care and custody of the cattle, was vested in the trustees. That the trustees, having the sole and exclusive control, were the only parties responsible for neglect and carelessness; that the mare and horse were received by the authorized agent of the trustees, and the money paid to and received by him; that what disposition he made of such money was of no consequence to a stranger, nor could any arrangement between the proprietors, as to a division of the pasture money, affect his rights; that, even admitting that Appley was told upon whose rights his beasts were to be turned, this fact raised no contract; that the fact of such telling, though sworn to by Stratton, was denied by Appley, and there being therefore evidence on both sides of the case,

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the case should go to the jury; that were he to sue Dayton, Osborn and Baker, the proprietors owning the rights, he could not recover: 1st. Because, by the act, they were excluded from all care of the cattle. 2d. Because it would be impossible to tell upon which share the mare died; and finally, that at all events there was evidence on both sides, and the cause should therefore be left to the jury. The motion for a nonsuit was granted, to which ruling, and each and every part thereof, the counsel for the plaintiff excepted. It was ordered, that the exceptions taken be argued, in the first instance, at general term, and that forty days be allowed the defendant to make and serve a case, and that in the mean time all further proceedings on the part of the defendants be stayed.

Slosson, Hutchins & Fellows, for the plaintiff.

Miller & Tuthill for the defendants.

By the Court, BROWN, J. The plaintiff in his complaint alleges that the defendants are a body corporate, duly incorporated by the act of the legislature of the state of New York, passed April 2, 1852, and as such corporation are seised and possessed of a large tract of undivided lands situate in Montauk, town of East Hampton, Suffolk county, which they employ in pasturing, for a suitable compensation, the cattle, horses, sheep and other animals of such persons as apply for that purpose. He then alleges that on the 20th of July, 1858, he was the owner of a valuable mare called the Prairie Queen, and entered into a contract with the defendants to take the mare into their keeping, and provide her with good and sufficient pasture, and to exercise reasonable care and supervision over her while in their keeping, for a reasonable compensation to be paid by him to them therefor. That in pursuance of the agreement the mare was delivered to the defendants, who received her into their possession to be pas-

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tured and cared for, as before mentioned. He further alleges, that through the carelessness, negligence and mismanagement of the defendants the mare strayed into and became mired and entangled in a dangerous marsh and morass, and there being unable to extricate herself died, and claims damages in the sum of \$5000. The answer denied all the material allegations of the complaint, except the incorporation of the defendants.

By reference to the act of the 2d April, 1852, to incorporate the proprietors of Montauk lands, in the town of East Hampton in Suffolk county, it will be seen that its provisions are quite narrow, and limited to a very few objects. The trustees are not vested with the title to the lands, and if they have any possession whatever, it is nominal and not actual. The 1st section creates and names the corporation, and provides for seven trustees, to be known as the Trustees of Montauk. Section 2 provides for annual meetings of the proprietors of the common lands of Montauk, and gives a majority of them power "to make such rules and regulations for improving, managing, governing and using such lands as they may deem proper." These rules and regulations relate to the management and use of the lands by the proprietors or tenants in common themselves, and not by the seven trustees, for the benefit of the proprietors. It provides for the election of the trustees, and defines the qualifications of the voters. Section 4 declares the trustees shall have the superintendence of the lands, with power to make rules and regulations for managing, governing, using and improving the same, but they are not to contravene the rules and regulations made by the proprietors themselves. By section 5 the trustees have authority to maintain actions for injuries to the proprietors, whether by trespass on their lands, breaches of the by-laws, or breach of any contract. And section 6 declares it unlawful for any proprietor to cut or carry away from such lands any wood, timber, grass or other produce, or to plow, plant, or sow, or in any other way to use the lands, otherwise

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than in conformity with the rules and regulations established by the proprietors and the trustees. And the trustees are also to be bound by such rules and regulations. These are substantially all the provisions of the act of incorporation. They do not vest the trustees with the title, or give them the possession of the lands. Nor do they empower the trustees to sell the grass or herbage growing thereon, or to enter into contracts of agistment which shall bind the corporation, such as is set up in the complaint in this action. The main purpose of the act is to regulate the manner in which the proprietors or tenants shall enjoy the use of their respective shares in the lands. Its purpose is that of internal government, and is designed to insure to each proprietor the use of his share in the lands, and not to deal in the name of the corporation with persons outside of the proprietors or tenants in common. The plaintiff offered no proof, upon the trial, tending to show the state of the title or the occupation, or that the trustees were vested with any authority to enter into the contract under which he claims to have put his mare upon the lands where she was injured.

The proof, however, obtained from his own witnesses, principally on their cross-examination, established that the lands consist of about 9000 acres, held by 125 owners as tenants in common, and divided into five fields. The first is known as the hither woods, four miles in length and two in breadth. The next, called the north neck, on the east side of Fort pond, said to contain 1800 acres. The next, called "between the ponds," and these are called outside fields. There are two fields, "East Indian field," and "Point field"—fattening field. The rights of the proprietors are designated by pounds, shillings and pence. Five pounds constitutes a right which entitles the owner to put upon the lands six cattle, or three horses, and so on in the same proportion. A share is forty pounds. It was admitted that Sidney H. Stratton, George Osborne and Patrick T. Gould were at the time the mare was put upon the lands to pasture, and had been for nine years

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previous thereto, the keepers of Montauk, regularly appointed by the defendants. The duties of these keepers is expressed in the trustees' book of minutes, in the following terms: "to take the general care of the stock on the land, to keep the fences. To keep all cattle and horses in the fatting field that should be in, and all out that should be out, through the season, and to get out all cattle and horses they may find in the mire and take care of them." Jacob A. Appley, the plaintiff, testified that he applied for pasture to Stratton, one of the keepers. Stratton, he said, "told me there would be a vacancy and he would get it for me. He did so. I applied for pasturage for two horses; think he sent me word of the vacancies, and I turned on two horses. About July 20th, 1858, sent on the two horses." He also testified that he paid \$4 for the pasturage of the two horses, and afterwards found the mare dead in a marsh or morass into which she had strayed and died. That the horses were to be pastured for the season. The plaintiff then called Harvey P. Hodges, who testified that the book which he produced was called the list book. It contains the amount of interest each proprietor has in the Montauk lands; the number of cattle, sheep and horses he is entitled to turn upon his right; the number of cattle, sheep and horses turned on, and in whose right. The book is kept by the clerk of the trustees of Montauk, and is left with the keeper to enter cattle that go on after the first of the season. Prior to that period the clerk makes the entries, and afterwards the keeper who lives at the first house, Montauk. The horses of Appley were entered, as appeared by the book, upon the right of Jeremiah Dayton, which was a horse right, and the rights of Sylvanus M. Osborne and Edward Baker, which were cattle rights, two cattle rights being equivalent to one horse right. The witness further testified, that the amount which each man is entitled to turn on is ascertained by the clerk, and he makes up his book every year. Persons who have no rights may turn them on by hiring of those who have the rights; in no

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other way. The trustees have no fields which are appropriated to the cattle of those who are not proprietors. The trustees, as such, have no right to turn on any cattle. They must be proprietors. The trustees receive no compensation for any cattle turned on Montauk lands. Cattle are never received by virtue of any contract made with the trustees. The compensation paid for pasturage always goes to the owner of the right on which the animal is put. Samuel Stratton, called by the plaintiff as a witness to prove the loss of the mare, testified, on his cross-examination, "Appley did not agree with me about his mare going in Montauk. I got rights for him. He spoke to me, and I told him I knew of some vacant rights, and would send off to see whether he could have them. My brother went off and got them. Appley came to my house and I told him my brother had engaged those rights, and he might turn his horses on. I told him of whom I had engaged those rights. I told Appley that Sylvanus Osborne had a one horse right. I got one beast right of Jeremiah Dayton and another of Edward Baker. I don't know whether they owned them. I received the money from Appley for those rights, and paid it to the men from whom the rights were obtained." This testimony came from the plaintiff's witnesses. It was not contradicted, or its force modified in any way. The facts that it established were the undisputed facts of the case, and they are to determine the plaintiff's right to recover in the action. They show that the trustees had no rights of pasturage in the lands to sell or dispose of in any way, and no right whatever to enter into any contract in regard thereto. They also prove that the plaintiff made no contract with the trustees. That they did not receive his mare into their custody, and consequently were not bailees of his property, and owed him no duty or obligation in regard to the care thereof. His contract, such as it was, was with Osborne, Dayton and Baker, and if there is any responsibility upon the contract for the loss of the mare, they are the persons to answer. When the

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evidence for the plaintiff was closed, he had failed to prove all the material facts set up in his complaint, except the loss of the mare in the morass. There was no ground upon which he could claim a verdict, and he was nonsuited.

Various questions upon the admissibility of evidence were raised upon the trial, which I decline to consider, because in no aspect of the case do I think the plaintiff entitled to recover in the action.

Judgment upon the nonsuit should be entered for the defendant.

[ORANGE GENERAL TERM, September 8, 1862. *Emott, Brown, Scrugham and Lott, Justices.*]

THE PEOPLE OF THE STATE OF NEW YORK *vs.* CORNELIUS
VANDERBILT.

The act of the legislature of March, 1820, authorizing the corporation of New York to extend the battery into the river not exceeding 600 feet, vested in the corporation the title to the soil under the water so to be filled in, but limited the use of the land so to be made out of the water, to be for a public walk, and for erecting buildings and works of defense thereon, but without any power to the corporation to dispose of the same for any other use or purpose whatever, and without any power of selling it, or any part thereof. *Held* that this restriction, in the act, prevented the corporation from selling or otherwise disposing of any part of the land so to be acquired, for any private purpose whatever.

Held, also, that any grant or other conveyance of the land, for any private purpose, would be void; and that any attempt to use the land for purposes forbidden by the grant, would justify the people of the state in applying to a court of equity to prevent such a breach of the condition in the grant, independent of the act of 1857, establishing an exterior line and prohibiting the extension of any piers beyond that line.

Held, further, that the passage of the act of 1857 did not deprive the grantors of that right; notwithstanding that act provides a method by which, after a pier or other obstruction to the navigation has been erected, it may be removed.

The existence of the power to compel the removal of an obstruction, after it

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has been created, does not prevent an application to the court to prohibit the erection of such obstruction.

If there is no legal authority for the erection of a pier, in a navigable river, such pier will be a nuisance *per se*; and no evidence is admissible to show that though illegal, it will do no harm.

APPEAL from a judgment entered at a special term. The action was brought to restrain the defendant from erecting a pier in the waters of the harbor of New York, south of pier No. 1, North river, opposite the battery and Battery place. The title of the people of the state to the bay and harbor of New York, and their sovereign right to the use and enjoyment thereof, for the purposes of commerce and navigation, free from all interruption and encroachment, were alleged in the complaint, and not denied in the answer. The judge before whom the cause was tried, at the circuit, found the following facts:

1. The defendant heretofore, after the 17th day of April, 1857, and before the commencement of this action, entered into and upon the waters of the harbor of New York at a point south of the pier known as pier No. 1, North river, and west of the battery, and outside of and beyond the existing pier line designated and established in and by the act of the legislature of the state of New York, entitled "An act to establish bulkhead and pier lines for the port of New York," passed April 17, 1857; and commenced and continued the erection of a pier in said waters, and was at the time of the commencement of this action engaged in the erection of a section of said pier, commonly called a "crib," being a large and permanent structure sunk to the bottom, and extending or to be extended upwards to and above the top of the water, and filled in with stone, and designed as a section of a pier, to be extended and maintained from the foot of Battery place to and beyond said crib, parallel to said pier No. 1; all which proposed pier, if erected, would be outside of and beyond the aforesaid exterior line.

2. That the legal title to the soil under water on which

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said crib is erected, and said proposed pier is designed to be erected, was prior to 1821 vested in the plaintiffs, and that said plaintiffs have made no conveyance or grant thereof, nor have they given any rights of property or occupation, or other privilege therein, except the grant to the mayor, aldermen and commonalty of the city of New York, contained in the act of the legislature of the state of New York, entitled "An act to provide for the expense of extending the battery in the city of New York, and for other purposes," passed March 27, 1821, which last mentioned act provides as follows: "That it shall be lawful for the mayor, aldermen and commonalty of the city of New York to extend that part of the city usually called the battery, into the bay and North and East rivers such distance as they may deem proper, not exceeding six hundred feet; and further, that all the title of the people of this state in and to the land and land under water in front of and adjoining to the said battery, and extending from thence into the bay and the North and East rivers, a distance not exceeding six hundred feet, shall be and the same is hereby vested in the mayor, aldermen and commonalty of the city of New York and their successors for ever, to remain for the purpose of extending the said battery for a public walk, and for erecting public buildings and works of defense thereon, but without any power to dispose of the same for any other use or purpose whatsoever, and without any power of selling it, or any part thereof."

3. That before such erection of said pier was commenced by the defendant, a certain resolution had been passed by both branches of the common council of the city of New York, and approved by the mayor, on the 16th day of May, 1853, of which resolution the following is a copy: "*Resolved*, that permission be and it is hereby granted to C. Vanderbilt, Esq. to widen a small pier, south side of pier No. 1, North river, on the southerly side, so as to make the same forty feet wide, and that it be extended parallel with pier No. 1, to the exterior line, at a distance of 150 feet from

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said pier, under the direction of the street commissioner;" and that the defendant claimed to erect said pier in pursuance of said resolution.

4. That the crib or pier, in the erection of which the defendant was engaged as hereinbefore stated, was within the space of six hundred feet, in the said act of 1821 mentioned, and was upon the land under water in front of and adjoining to the battery described in the said act, and was also within the space within which permission to extend a pier was given to the defendant by the said resolution of the common council of the city of New York, dated May 16, 1853.

5. That afterwards, and before the commencement of this action, the common council extended the battery beyond the small pier referred to in the said resolution, so as to include the said small pier and destroy the same, the made ground of the enlargement reaching and extending beyond and including the said small pier.

The judge found the following conclusions of law:

1. That the aforesaid resolution of the common council conferred no right upon the defendant to erect the pier in question. That if any such right was conferred thereby, it was revocable and was revoked by the common council by the act extending and enlarging the battery, so as to destroy the small pier referred to in the resolution; that the acts of the defendant in entering upon the said waters of the harbor of New York, and erecting said "crib" or section of a pier, were and are unauthorized and illegal; that said "crib" or section of a pier is an unauthorized structure in, and an encroachment upon, the harbor of New York, and a public nuisance, and that said proposed pier, if erected, would be wholly an unauthorized, illegal encroachment on the said harbor, and a permanent and continuing public nuisance.

2. He further found that the plaintiffs were entitled to an injunction perpetually restraining the defendant, his agents and servants from proceeding in the erection of said pier,

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and to a judgment so enjoining said defendant, and directing him forthwith to abate said nuisance and remove said "crib" or section of a pier, and that the plaintiffs were entitled to recover their costs in this action, of the defendant.

The following opinion was delivered by the justice at the special term :

ALLEN, J. "The jurisdiction of the state over the bay and harbor of New York, and its title to the land under water within the harbor, are not controverted. The soil of the sea, estuaries and navigable rivers within the state, is in the people of the state as the successor of the crown, and any one claiming it exclusively must show a right. (*Phear on Rights of Water*, 41. *Carter v. Murcot*, 4 Burr. 2, 162.) At common law any encroachment upon a public stream was a *purpresture*, that is, the making of that several and private, which ought to be common to many; and an obstruction in a public river is a nuisance, and may be dealt with as such. (*Woolrych's Law of Waters*, 192, 196. *Weld v. Hornby*, 7 East, 195.)

It is said that even a grant from the crown cannot make a nuisance of this kind legitimate; that the *jus publicum* is paramount to any right of property in the crown; the crown being in fact but its subjects' trustee for the purpose of securing to them collectively all the advantages and privileges which can accrue from such property. (*Phear on Water Rights*, 44. *Woolrych*, 194. *Williams v. Wilcox*, 3 Nev. & Per. 606.) Without a grant or authority from the sovereign power, every obstruction of a navigable river will be a nuisance, and no evidence need be given of the extent to which the public right is impaired or the public use of the river impeded. It is sufficient that the public domain which is devoted to a public use is invaded in a way to deprive the public of the use of any part of it. In case of a grant or license to erect a dam, pier, or dock, or wharf, or other obstruction in a navigable stream, it could not be held a nui-

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sance, without proof of the fact that the public damage and injury resulting from the obstruction greatly exceeded the public benefits of the erection, and perhaps not even upon proof of an entire destruction of the *jus publicum*. But any obstruction placed in a public way without right—and a public navigable river stands upon the same footing as a highway—would be a nuisance, and courts will not inquire whether the advantage arising from the act complained of would compensate for all the injury and inconvenience which the public would suffer from it. In *King v. Ward*, (4 A. & E. 384,) Lord Denman says: "In the infinite variety of active operations going forward in the industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, in the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy." In that case, the defendant was indicted for a nuisance in a navigable river and king's common highway, by erecting a building of stones across the stream; and the jury found the fact that the defendant had erected the alleged nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration thus made; and the court held that this finding amounted to a verdict of guilty. To the same effect, see *Hart v. Mayor of Albany*, (9 Wend. 571;) *People v. Cunningham*, (1 Denio, 524.)

Among other remedies for an obstruction of public navigation, courts of equity will grant an injunction to prevent a threatened or attempted obstruction. (*Att'y Gen. v. Johnson*, 2 Wils. Ch. R. 87. *Lane v. Newdigate*, 10 Ves. 192.) Denio, Ch. J. in *Davis v. Mayor &c. of New York*, (14 N. Y. Rep. 526,) lays down the rule thus: "It is well settled that where such an offense (a nuisance) occasions, or is likely to occasion, a special injury to an individual, which cannot well be compensated in damages, equity will entertain

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jurisdiction of the case at his suit; and also that the attorney general, in all cases where a preventive remedy is called for by the circumstances, or the state, in its own name, may apply for an injunction against the perpetrator of the wrong;" and see the cases cited at the page referred to, and also *People v. Mayor &c. of New York*, (32 Barb. 102;) and *Milbau v. Sharp*, (17 id. 445, per Harris, J.)

If the defendant is proceeding without right to erect the pier complained of, this is a proper case for the preventive remedy by injunction, and the suit is well brought in the name of the people.

The defendant asserts a right by grant to erect the pier which is complained of as an obstruction to the navigation, and as a nuisance. Had the grant been established to the extent and for the purposes claimed, a question might well be made whether such a grant would not of necessity yield to the prior and paramount *jus publicum*, and be so construed as not to permit any act inconsistent with the necessary use of the waters by the public, as such necessity should be declared by the legislature, and whether the act establishing the bulkhead and pier lines of the port of New York would not, as an exercise of power over the navigable waters of the state, vested in, and exercised by, the sovereign power of the state for the public good, overreach and annul, *pro tanto*, any prior grants of parts of such navigable waters for individual purposes, and this without compensation, as for private property taken for public purposes. Certainly, any grant or license to the city for public purposes would not deprive the state of the power to recall the grant or revoke the license, in order to secure to the public the use of the stream for the more legitimate purposes of navigation. But the view I take of the title and claim of the defendant renders it unnecessary to consider the question. Chapter 785 of the laws of 1857, confirming the action of the common council of the city of New York, in the widening of Battery place, and authorizing the construction of a ferry slip at the foot of

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Battery place, cannot aid the defendant. The act does not confirm any license before then given to the defendant for the widening and extension of a pier parallel to pier No. 1, but simply authorizes the common council thereafter to permit a ferry slip to be constructed in the manner then provided by law. The common council have not, so far as appears, acted under this statute, and the defendant has acquired no rights under it. Another provision of the act would be fatal to the defendant in this action, and condemn the pier which he proposes to erect. It was enacted that the ferry slip authorized by that act should not be extended beyond, or interfere with, the exterior line of the harbor of New York, as established by law. Chapter 763 of the laws of the same session had established that line, and it is not denied that the proposed line of the defendant's pier extended beyond it.

But stress is laid upon other acts of the common council. By resolution of the common council, approved by the mayor, May 10, 1853, permission was given to the defendant to widen a small pier, south side of pier No. 1, North river, on the southerly side, so as to make the same forty feet wide, and to extend it parallel with pier No. 1, to the exterior line, at a distance of one hundred and fifty feet from said pier, under the direction of the street commissioner. The small pier referred to was subsequently, and before the defendant acted under this license, by the act of the common council in enlarging the battery, merged in and absorbed by the battery, the made ground of the enlargement reaching and extending outside and beyond the pier. The destruction of the pier in the way mentioned was an effectual revocation of the license to enlarge it, and the resolution gave the defendant no authority to construct a new pier from any point in the outer line of the battery as enlarged.

But a still greater difficulty, if possible, exists in the want of power in the common council to grant any such license. Certain uplands within the city of New York have from time to time been granted to the city of New York by the people

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of the state, some for general purposes, and absolutely, and others for specified purposes, and qualifiedly. I find, and have been referred to no statute, charter or grant, by which the title to lands under water, or jurisdiction over the navigation and the rights of the public in the waters of New York harbor, has been transferred to, or vested in, the common council of the city. The act of 1821 (chap. 172) authorizes the enlargement of the battery by the city, and the title, when enlarged, was vested in the city for a public walk, for public buildings, and for purposes of defense, "but without any power to dispose of the same for any other use or purpose whatsoever, and without any power of selling it, or any part thereof." And the same limitation of power is found in the act of 1790, (chap. 25,) conveying to the city Fort George and the lands adjoining, for the same public purposes. The ordinance of 1853 does not purport to confer a title upon the defendant; and had the city, instead of giving the license under which the defendant seeks to justify the erection of the pier, in terms granted, for a valuable consideration, the *locus in quo*, the lands under the water, with express permission to erect this structure, the grant would have been void as *ultra vires*. But no such thing was attempted. The city gave a license, without consideration, which it had no authority to give, and which was revocable at pleasure, and which was soon thereafter revoked by making it impossible for the defendant to avail himself of it.

But if it should be conceded that the license, in the absence of any act of the state sovereignty, would have protected the defendant from indictment for the nuisance, still the state having the right, and being under obligation to protect and preserve the navigable waters for the uses of the public, having by law made erections under such license unlawful by prohibiting them, the license itself is annulled by an authority paramount to that of the city. The law of 1857, fixing the exterior lines of the piers and docks in the city of New York, and prohibiting erections outside of such

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line, makes all such erections unlawful—the legislature having the exclusive jurisdiction in the premises. The legislative prohibition makes all structures in contravention of it nuisances, and the courts cannot sit in review of the legislative will and discretion. No property of the city or of the defendant has been taken for any purpose, public or private. The state has prohibited trespasses upon public navigable waters of the state. The state can protect its property, and the public in the use of public highways, without providing compensation to those who are guilty of *purpresture*, or are seeking to appropriate to themselves what of right belongs to all.

The defendant is without color of title or shadow of right to the *locus in quo*, and the erection of the pier is without authority of law, and against the statute of 1857, fixing the exterior line of the bulkheads and piers in the city of New York, and would if erected be a nuisance, indictable and removable as such, and the plaintiffs are entitled to the relief demanded, with costs."

Judgment was accordingly entered in favor of the plaintiffs, perpetually enjoining the defendant from proceeding in the erection of the pier, and from doing any act or thing to create any encroachment upon, or obstruction in, the waters of the harbor of New York, or tending thereto, and directing him to abate the alleged nuisance, and to remove the same. The defendant thereupon appealed to the general term.

Horace F. Clark and *Chas. A. Rapallo*, for the appellant.

D. S. Dickinson, (attorney general,) and *Wm. A. Butler*, for the respondents.

By the Court, *INGRAHAM, P. J.* This action was brought to restrain the defendant from enlarging a pier known as No. 1, North river, adjoining the battery. The right of the defend-

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ant to make such enlargement is claimed under a resolution of the common council, passed in 1853, granting permission to the defendant to widen the pier and to extend it to the permanent or exterior line. The right of the corporation to grant such a permission depends upon their title to the land upon which the pier was to be erected. The claim of title in the corporation is based upon the act of March, 1821, which authorized the corporation to extend the battery into the river not exceeding 600 feet. This act vested in the corporation the title to the soil under the water so to be filled in. If this were all, there would be no question as to the right of the defendant to enlarge the pier, except so far as it might afterwards be restrained by the act of 1857, establishing a new exterior line, and which prohibited the building of piers beyond that line. But the same act which gave the right to fill up to the extent of 600 feet, also contained the limitation on the use of the land so to be made out of the water, by limiting the same "*for a public walk, and for erecting buildings and works of defense thereon, but without any power to dispose of the same for any other use or purpose whatever, and without any power of selling it, or any part thereof.*"

This restriction upon the use of the land for any but public purposes of a public walk or for defense, prevented the corporation from selling or otherwise disposing of any part of the land so to be acquired, for any private purpose whatever. Any grant or other conveyance of the land for any such private use would be void; and a breach of that condition, by the corporation, would justify the state in any legal measures to prevent its violation. Wherever any such attempt is made to use the land for purposes forbidden by the grant, the grantor would have a right to interfere; and an application to the court to prevent such misuse of the land would clearly be within the province of a court of equity.

This view of the question at issue is independent of the act of 1857 establishing an exterior line, and prohibiting the

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extension of any piers beyond that line. If it be held that the state could interfere to prevent the breach of the condition in the grant independent of that law, the passage of that act does not deprive the plaintiffs of such right. It is true that a way is provided by which, after the pier has been erected, it may be removed; but the remedy sought in this action is to prevent the injury to the navigation by prohibiting the erection of the pier. The power to compel a removal of an obstruction after it has been created, does not prevent an application to the court to prohibit the erection of such obstruction before it is completed.

It is urged for the defendant that this was only filling a portion of the land under water, which was authorized by the act of 1821. The act of 1860 prohibited the filling beyond the exterior line, and was of itself enough to prevent this obstruction of the river. But independent of that statute, it is idle to say that this was the filling up contemplated by the statute, when all the authority of the defendant was under the resolution of the common council which granted permission to the defendant to widen a pier, and the injunction granted was against erecting the pier which the court found to be unauthorized and a nuisance.

It is also contended that the judge erred at the trial in excluding the evidence offered by him to show that the proposed pier would not be an actual nuisance; but no such question was involved in the issue. It was immaterial whether it would have been an actual nuisance or not. The real question was whether the erection of the pier was authorized or not. If there was no legal authority for the erection of the pier, it was a nuisance, and no evidence was admissible to show that though illegal it would do no harm. In the language of the learned justice before whom the cause was tried, "any encroachment upon a public stream was a purpresture, that is, the making of that private which ought to be common to many; and an obstruction in a public river is a nuisance, and may be dealt with as such." Such an erec-

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tion is a nuisance *per se*, and needs no evidence to prove that, as a matter of fact, after the erection of it is shown to be in violation of law.

I see no ground for interfering with the decision below.

The judgment must be affirmed, with costs.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Barnard and Clarke*, Justices.]

SUSANNAH B. YOUNG, adm'x, &c., *vs.* JAMES H. BRUSH and others, ex'rs, &c.

Where the domicil of a testator is in this state, and his will is proved and letters testamentary issued here, where all the personal estate is situated, it is unnecessary for the executor to prove the will in another state, where the real estate of the testator is situated; and he will not be allowed the expenses incurred in doing so, on the settlement of his accounts.

The distribution of the personal estate, in such a case, is to be according to the laws of New York; and a decree of a court in the state where the real estate is situated, directing the expenses of proving the will there to be paid out of the estate, has no force or validity here; and cannot make those expenses chargeable to the legatees under the will, in this state.

Under ordinary circumstances, where a party *refuses* to pay over moneys held by him in a fiduciary character, he should be charged with interest; and the fact of its being deposited for safe keeping, in a bank or trust company, does not relieve the trustee from such liability; even though he receives a smaller rate of interest.

But where money was deposited by executors, in a trust company, under the direction of a referee, and with the consent of the counsel of the opposite party, as to the place of deposit, to be applied to the payment of any recovery in the action; it was *held* that, in the absence of any demand of the payment of the money, the executors were not chargeable with a higher rate of interest than was received for the fund while it was deposited in the trust company.

THIS action was brought by the plaintiff, as administratrix with the will annexed of Catharine C. Young, deceased, against the defendants as executors &c. of David Brush, deceased, for an account by the defendants touching

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the property and assets of Catharine C. Young, which came to the hands of the said David Brush in his lifetime, or with which he was justly chargeable as executor of the said Catharine C. Young. And the plaintiff, in her complaint, prayed that the defendants might be adjudged to pay to her the sum which, on such accounting, should be found due and owing to her as such administratrix. The action was referred to a referee, who reported that the sum of \$5179.29 was due to the plaintiff as administratrix, from the defendants as executors; and from the judgment entered upon that report the defendants appealed.

Charles H. Smith, for the appellants.

Geo. T. Strong, for the respondent.

By the Court, INGRAHAM, P. J. The defendants, in the settlement of the account of their testator as the executor of Catharine Young, claimed to be allowed the expenses of proving the will in New Jersey. All the personal estate was in New York. The will was proved in New York, and letters testamentary issued here. Afterwards, Mr. Brush, the executor, submitted the will for probate in New Jersey, where the deceased owned some real estate. The probate was contested there, and a large amount of expense was incurred. These expenses were claimed by the defendants as a credit, and disallowed by the referee. The referee has found that the domicile of the testatrix was in New York, and that the will was properly admitted to probate here; and that the decision on the will in New Jersey was only as to the real estate.

We see no reason for submitting the will to probate in New Jersey, excepting so far as the devisees of the real estate there might consider it necessary for establishing their title to the same. For this purpose the executor was not called upon to prove the will. Any party relying on it as the

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source of his title could prove it on a trial, by witnesses, with the same effect as if admitted to probate, if not greater. There is no ground upon which such an expense should fall upon the legatees of the personal estate in New York. The distribution of the personal estate was properly found to be according to the laws of New York, and the decree of the court in New Jersey directing those expenses to be paid out of the estate had no force or validity here, and could not make those expenses chargeable to the legatees under the will, in this state.

The question of domicile was a question of fact for the referee. With his finding we would not interfere, even if we doubted the correctness of that decision. But we concur with him in that finding, because we consider the weight of evidence upon this point very much against the defendants.

The only point upon which we entertain doubt is as to the charge of legal interest against the executor, on the moneys deposited with the trust company. Under ordinary circumstances, where the defendant *refuses* to pay over moneys held by him in a fiduciary character, he should be charged with interest, and the fact of its being deposited for safe keeping, in a bank or trust company, does not relieve the trustee from such liability; even though he receives a less rate of interest. (*DePeyster v. Clarkson*, 2 *Wend.* 77.) But where the money has been kept ready to be paid over, then interest is not to be charged. (11 *Paige*, 142.)

In the present case the money was deposited in the trust company under the direction of the referee, and with the consent of the defendants' counsel as to the propriety of the place of deposit, to be applied to the payment of any recovery in the action. As the defendants were executors, and the money was deposited under the direction of the referee, it is clear that the defendants could receive no benefit from the fund. Nor does it appear that any demand was made for the payment of this sum, other than is to be inferred from the commencement of the suit, which called for an account-

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ing first. Under all the circumstances, we think the defendants should not have been charged with a higher rate of interest than was received for the fund while it was deposited in the trust company.

The judgment should be corrected, by the plaintiff remitting the amount of interest charged on \$3700 over three per cent, and affirmed for the residue.

If the plaintiff refuses to remit the amount, the judgment must be set aside, and the case referred back to the referee for correction in this respect.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Barnard and Clarke, Justices.*]

In the matter of the EXCELSIOR INSURANCE COMPANY.

An insurance company was incorporated under the general law. By the 7th section of its charter it was provided that "the rights, powers and privileges now or hereafter conferred by law on this company, are hereby vested in and shall be exercised by a board of directors, to consist of forty persons." Subsequently the legislature passed an act which provided as follows: "The Excelsior Insurance Company is hereby authorized to reduce the number of its directors to twenty-one, instead of forty, as provided by its charter." *Held*, that in the absence of any provision in the act requiring the act of reduction to be done by the stockholders, at a meeting for that purpose, the power rested in the board of directors. *CLERKE, J. dissented.* *Held, also*, that an election of directors could not be set aside as void and a new election ordered, on the ground that there had been no previous action taken by the stockholders to reduce the number of directors. *Held, further*, that the neglect or refusal of the stockholders, at such election, to vote for the whole number, did not make the election illegal. Such as had a majority of the votes were elected; and if there were vacancies left in the board of directors, in consequence of the omission to elect the whole number, the board had power, under the 8th section of the charter, to fill them, but not to hold a special election for that purpose.

THIS was an appeal from an order made at a special term, upon petition, setting aside an election of directors of the

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Excelsior Insurance Company, in the city of New York, and ordering a new election. The facts appear in the opinion of Justice Ingraham.

INGRAHAM, P. J. This company was incorporated under the general law. By the 7th section of the charter it is provided that "the rights, powers and privileges now or hereafter conferred by law on this company, are hereby vested in and shall be exercised by a board of directors to consist of forty persons." In April, 1862, the legislature passed an act which provided as follows: "The Excelsior Insurance Company is hereby authorized to reduce the number of its directors to twenty-one, instead of forty, as provided by its charter." After the passage of this act, a notice directing an election to be held for directors, and specifying the time and place of the election, was duly published, and at such election the stockholders elected only twenty-one directors, who entered upon their duties. The petition now asks to have the election set aside and a new election ordered, upon the ground that there had been no action taken by the stockholders to reduce the number of directors, and therefore the whole election is void. At special term the application was granted, and from this order the company appeal.

It appears to me to be clear that even if the correct number of the directors was forty instead of the reduced number, still the neglect of the stockholders to elect the whole number did not vitiate the election of those who had a majority of the votes cast. No provision of the charter, and no law, compelled each stockholder to vote for the whole number of directors, and their refusal or neglect to vote for the whole number did not make the election illegal. Such as had a majority of the votes were elected. There may have been a tie vote as to some which would prevent the election of the whole number, and yet it would not be contended in such a case that the election of those who had a majority was void on that account. It nowhere appears that stockholders were

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not allowed to vote for as many as they pleased ; and the returns do not show that any one, not even the petitioner, voted or desired to vote for any more. If the petitioner or any other stockholder claimed to have a right to vote for forty directors he should have exercised that right, and then he could have insisted on the admission of the forty persons having the largest number of votes to be directors, if he was right in his supposition that the number had not been properly changed.

The next question is as to the mode of putting into operation the provisions of the act of 1862, reducing the number of the directors. The decision of the special term appears to be based upon the supposition that the act of reduction should be by the stockholders, and not by the board of directors. The statute says, "The company is authorized to reduce the number of its directors," &c. It makes no provision for a meeting of the stockholders for that purpose. In the absence of any provision of that character, the power rested in the board of directors. Stockholders, as such, possess no powers in the management of a corporation, except specially authorized so to do by their charter. Their power ends with the election of the directors. Their acts, without the action of the board of directors, would be inoperative. This was clearly stated by Lott, J. in *McCullough v. Moss*, (5 Denio, 567, 575.) He says : "Where a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character. The corporators have no right to interfere, and courts will not, even on a petition of the majority, compel the board to do an act contrary to their judgment. The stockholders, as such, could do no corporate act. The directors were their representatives, and alone authorized to act. So also in *Conro v. Port Henry Iron Co.*, (12 Barb. 27, 63,) Willard, P. J. says : "The stockholders had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. * * * When not acting in their official character, (as

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directors,) and in the mode prescribed by law, their acts are no more binding than those of other private citizens."

This view of the question is founded on the general principles applicable to corporations. In the present case the provisions of the charter are so full as to remove any doubt, if it could exist, on this question.

The 7th section of the charter expressly gives to the board of directors, and vests in the board, all the rights, powers and privileges now or hereafter conferred by law on the company, and such powers are to be exercised by the board. The power to reduce the number of directors is given to the company by their corporate name. By this section the power is vested in the board of directors, and shall be exercised by them. Any other mode would be contrary to these provisions. The directors might with propriety have submitted to the stockholders the matter for their advice, but afterwards the action of the board of directors was necessary to carry it out.

We are then to inquire whether the board have so acted; and upon this point the papers are silent. Nothing appears in the case, except that pursuant to notice of an election the stockholders elected a less number than forty—and that the persons so elected entered upon their duties. Why the rest were not elected does not appear. As before suggested, an omission to elect the full number will not vitiate the election of the residue. If the board of directors have not accepted the act of 1862, and exercised the authority vested in them by that act, the number would still remain as fixed by the charter. In such a case there would be vacancies in the board of directors. The 8th section of the charter provides for filling such vacancies by the board if they exist; but no authority is given to hold a special election where only a part of the board has been elected.

There is not, in my judgment, any ground for setting aside the election of those who were elected, and no reason for ordering an election of other directors not chosen by the stock-

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holders. The provisions of the charter provide for such a case, and if the board of directors do not comply with the provisions of their charter, the remedy is different from that now sought by the petitioner.

I think it proper to add that (as heretofore shown) the power is with the board of directors, and that board can now remove any doubt that may exist by filling the vacancies in the present board, and adopting a formal resolution reducing the number of directors previous to the next election.

I think the order at special term should be reversed.

BARNARD, J. concurred.

CLERKE, J. (dissenting.) I agree with so much of the opinion of the presiding justice as asserts that when a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character, and the corporation have no right to interfere. But this principle, I consider, is confined to the ordinary affairs of the corporation; in other words, to the business in which it is engaged, and every thing incidentally necessary to the prosecution of that business. I do not think this power extends to any matter relating to the constitution or organization of the company; and hence, when the legislature, as in this case, authorizes the company "to reduce the number of its directors from forty to twenty-one," or to make any other organic change, the suffrages of the stockholders are necessary legally to effectuate it.

I am aware that the language of the 5th section of the charter expressly gives to the board of directors "all the rights, powers and privileges now or hereafter conferred by law on the company." This, no doubt, invests the board with all the rights, powers and privileges essential to the prosecution of the business of the company. The stockholders, as such, could perform no corporate acts; the directors are their representatives for this purpose; and they alone can

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exercise the rights, powers and privileges necessary to the performance of such acts. But they have no right to undertake the performance of any act which effects any organic change in the constitution of the company, when the act of the legislature, allowing the change, states that the company is authorized to make it. I think it is left to the option of the stockholders alone, on due notice, to accept or reject the exercise of the power conferred by the act.

The special term, however, erred in entirely setting aside the election and ordering a new election for forty directors. The election sought to be set aside was good, as to the number who were elected. The order should therefore be accordingly modified, and a new election ordered for nineteen directors, to complete the number required by the charter. (*Matter of the Union Ins. Co.*, 22 Wend. 591.)

Order reversed.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Barnard and Clarke*, Justices.]

JULIA A. C. WOOD, executrix, and others executors &c., vs.
BENJAMIN F. HUNT and others.

When a party receives a conveyance of land or other property from an insolvent, without actually paying, securing or becoming bound to pay any consideration therefor, no further proof of knowledge or notice of the fraudulent intent of the grantor against his creditors, is necessary in order to charge the grantee with complicity in the fraud.

The subsequent voluntary payment by the grantee of valid debts existing against the grantor, or the purchase of obligations against him, or even the payment of some money, subsequently, to the grantor, will not create a presumption in favor of the good faith of the grantee, or sustain the validity of the conveyance.

Nor does the grantee, by such evidence alone, present a case which entitles him to demand, as a condition to the granting of relief to the creditors of such a grantor by adjudging it void and directing a sale of the premises,

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and the satisfaction of a judgment creditor from the proceeds of the sale, that any provision shall be made for the indemnity of the grantee for sums which he has voluntarily paid to parties having demands against the grantor.

The complicity of the grantee in the fraud of the grantor deprives him of any right to relief in respect to such payments, from a court of equity.

A grantee of a well known insolvent, who cannot show that he paid some present consideration at the time of the conveyance, or that he then secured, or undertook by some promise, to pay in future, cannot claim to be ignorant of the fraudulent intent of the grantor against his creditors.

On a trial occurring in January, 1860, a defendant was not authorized to give evidence as a witness in his own behalf, in a suit brought by an executor of a deceased person, notwithstanding a co-defendant, united with him in interest, had been previously examined as a witness for the plaintiff.

Plaintiffs cannot be permitted to depart from the case made by their own complaint, in respect to the unity of interest of the defendants, and adopt, for the purpose of defeating the application of a defendant to be examined as a witness in his own behalf, the case made by the answer of such defendant.

A judgment declaring a conveyance fraudulent and void as against creditors directed the premises to be sold, and that out of the proceeds the plaintiffs' judgments be satisfied; that the surplus, if any, be deposited in the trust company; and in case of a deficiency on the sale, that the defendant account for the rents and profits of the premises. *Held* that the judgment was erroneous in directing a sale of the premises to take place before the accounting; that provision rendering the judgment interlocutory, and preventing an appeal by the defendant and a stay of proceedings until after the premises should have been sold.

Held, also, that the judgment was erroneous in directing the surplus proceeds of the sale to be deposited in the trust company, instead of directing them to be paid over to the defendant.

APPEALS from a judgment entered upon the report of a referee, on the 23d day of January, 1861, and from an order made at a special term, on the 16th of March, 1861, denying a motion to set aside the judgment. The action was brought by the plaintiffs as executrix and executors of Silas Wood, deceased, who was a judgment creditor of Benjamin F. Hunt, senior, to set aside a conveyance of real estate made by said Benjamin F. Hunt, senior, to the defendant Benjamin F. Hunt, junior, as fraudulent and void as

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against the creditors of the grantor. The cause was referred to a referee, who found the following facts:

1. That Benjamin F. Hunt, senior, on or about the 24th day of October, 1845, at the city of New York, made his promissory note of that date for the sum of \$1400, payable ninety days after date, to the order of Thomas Beilby, which was indorsed by said Thomas Beilby and by John Moorehead, and delivered to Silas Wood, who, on the 24th day of December, 1847, recovered judgment thereon, in the superior court of the city of New York, for \$1791.60, of which judgment a transcript was on the same day filed in the office of the clerk of the city and county of New York, and another transcript in the office of the clerk of the county of Kings, and the said judgment was thereupon docketed in the office of each of said clerks; that on the 25th day of January, 1848, executions upon the said judgment against the property of said Benjamin F. Hunt, senior, were duly issued and delivered, one to the sheriff of the city and county of New York, and the other to the sheriff of the county of Kings, which were afterwards duly returned wholly unsatisfied; and on or about the 13th of October, 1848, another like execution on said judgment was duly issued to said sheriff of the city and county of New York, and afterwards returned wholly unsatisfied; that on or about the 23d day of May, 1848, the said Silas Wood recovered another judgment in the superior court against said Benjamin F. Hunt, senior, and Thomas Beilby, for the sum of \$922.79, of which a transcript was also filed and said judgment docketed in the office of the clerk of the city and county of New York, and an execution thereupon issued to the sheriff of the said city and county, and by said sheriff returned wholly unsatisfied; that on or about the 30th day of July, 1849, the said Silas Wood recovered another judgment in the superior court, against the said Benjamin F. Hunt, senior, and Thomas Beilby, for the sum of \$1054.24, of which a transcript was filed and said judgment was docketed in the office of the clerk of the

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city and county of New York; that on or about the 30th day of June, 1852, the said Silas Wood died at the city of New York, leaving his last will, duly executed, wherein and whereby he nominated and appointed the plaintiffs in this action executrix and executors thereof, which will was duly admitted to probate and proved before the surrogate of the city and county of New York, and on or about the 4th day of August, 1852, letters testamentary thereon were duly granted and issued by said surrogate to the plaintiffs as such executrix and executors, who qualified and have acted as such, and that no part of the amounts of said judgments or either of them has been paid, but they still remain in full force and wholly due.

2. That on or about the 7th day of May, in the year 1846, the said Benjamin F. Hunt, senior, executed and delivered to Benjamin F. Hunt, his son, and one of the defendants in this action, his deed of that date, purporting to be made for the consideration of \$40,000, and to grant and convey to said defendant Benjamin F. Hunt, his heirs and assigns, in fee, with covenant of warranty and the usual full covenants, five lots of land situated at the corner of Jefferson and South streets in the city of New York, on which the New York rice mills and its warehouse and stores are erected, with all the wharf and water privileges belonging thereto, in said deed and complaint described, subject nevertheless to two mortgages made by said Benjamin F. Hunt, senior, to secure in the aggregate \$32,000, stated to include and constitute so much of the purchase money in the deed stipulated, which deed was recorded in the office of the register of the city and county of New York on the 11th day of May, 1846.

3. That the said Benjamin F. Hunt, senior, at the time of making the said deed, was largely indebted and was insolvent, and on said 11th day of May, 1846, judgment in favor of the president and managers of the Delaware and Hudson Canal Company was recovered against him in the

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court, and docketed in said office of the clerk of the city and county of New York, for the sum of \$2000; that the said premises conveyed by said deed were at the time of such conveyance of the value of \$40,000, or thereabouts; that the defendant Benjamin F. Hunt did not at the time of such conveyance give to said Benjamin F. Hunt, senior, any security or obligation for the payment of the sum of \$8000, the difference between the consideration of \$40,000 expressed in said deed and the amount of the mortgages then on said premises, (thirty-two thousand dollars,) or any part thereof, nor then pay to said Benjamin F. Hunt, senior, or any other person, any part of said \$8000; that after the making of said deed, and between that time and the 12th day of May, 1850, the defendant Benjamin F. Hunt, with and out of the proceeds of the business carried on in and upon the said premises conveyed as aforesaid, and otherwise, paid to or for account of said Benjamin F. Hunt, senior, and in payment of debts and liabilities of said Benjamin F. Hunt, senior, various sums of money, amounting with the interest thereon in the aggregate (including the balance of a running account between said Benjamin F. Hunt, senior, and the rice mills on said premises, from the 7th day of May, 1846, to the 11th day of May, 1850,) to said sum of \$8000 and the interest thereon, and which is the only consideration claimed to have been paid by the defendant Benjamin F. Hunt for the conveyance to him of the said premises, subject to said mortgages.

4. That the said conveyance by said Benjamin F. Hunt, senior, to said defendant Benjamin F. Hunt of the premises above mentioned and in the complaint herein described or referred to, was so made as aforesaid to put such premises beyond the reach of the creditors of said Benjamin F. Hunt, senior, and hinder and delay such creditors in the collection of their debts.

And the referee found and deduced as conclusions of law:

1. That the said conveyance, made by the said Benjamin F.

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Hunt, senior, to the defendant Benjamin F. Hunt on or about the 7th day of May, 1846, was made and delivered and received with intent to hinder, delay and defraud the creditors of the said Benjamin F. Hunt, senior, and that the said Silas Wood, in his lifetime, and the plaintiffs as executors as aforesaid since his death, being creditors of said Benjamin F. Hunt, senior, as above stated, have been and are hindered, delayed and defrauded thereby. 2. That the said conveyance, as against the said Silas Wood and these plaintiffs, executors as aforesaid, as such creditors, was and is fraudulent and void. 3. That the plaintiffs are entitled to judgment herein declaring said conveyance void as against the said three judgments recovered by their testator, Silas Wood, as above mentioned, and for the payment and collection of said three judgments, with the interest thereon and costs of this action, with, from and out of the said premises and the proceeds and profits thereof, since such conveyance. Whereupon judgment was entered pursuant to said decision, in favor of the plaintiffs and against the defendants Benjamin F. Hunt and wife, on the 23d day of January, 1861, which judgment contained the following directions, viz :

That the premises in the complaint described, or so much thereof as may be necessary, be sold at public auction, in the city and county of New York, by the sheriff of said city and county ; that the said sheriff give public notice of the time and place of such sale according to law ; that either or any of the parties to this action may purchase at such sale ; that the said sheriff execute to the purchaser or purchasers a deed or deeds of the premises sold ; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon the premises so sold, at the time of such sale, for taxes or assessments, the said sheriff pay to the plaintiffs in this action, or their attorney, the sum of two hundred and nine dollars and eighty cents, adjudged to the plaintiffs for costs and charges in this action and for an allowance herein, and that said sheriff also

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pay to the plaintiffs or their attorney the said sum of seven thousand and seventy dollars and sixty-six cents, being the aggregate amount of the several judgments held by the plaintiffs and interest, with interest thereon from the date of the judgment, or so much thereof as the purchase money of said premises will pay of the same ; take a receipt therefor and file it with his report of sale ; and that said sheriff also pay to and deposit with the New York Life Insurance and Trust Company, subject to the order of this court in this action, the surplus money arising from said sale, if any there be remaining, after paying the several sums hereinbefore directed to be paid ; that he make a report of such sale and file it with the clerk of this court ; that if the proceeds of such sale be insufficient to pay the several sums of money directed to be paid, with interests and costs, the said sheriff specify the amount of such deficiency in his report of sale. And that in the event of such deficiency the defendant Benjamin F. Hunt, unless he shall elect to pay such deficiency, shall account for the rents and profits of said premises directed to be sold, since the conveyance to him thereof, by said Benjamin F. Hunt, sen., &c.

The defendants, upon affidavits, obtained an order requiring the plaintiffs to show cause, at special term, why the judgment should not be set aside and a new trial granted, and for a stay of proceedings in the meantime. On the 16th day of March, 1861, the court at special term made an order denying the motion.

David P. Hall and D. D. Field, for the appellants.

E. S. Van Winkle, for the respondents.

By the Court, LEONARD, J. The fraudulent character of the conveyance from Hunt, sen., to Hunt, jun., one of the defendants, is fully developed in the evidence and the facts

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found by the learned justice before whom this action was tried.

Where a party receives a conveyance of land or other property from an insolvent, without actually paying, securing or becoming bound to pay any consideration therefor, no further proof of knowledge or notice of the fraudulent intent of the grantor against his creditors, is necessary in order to charge the grantee with complicity in the fraud. The subsequent voluntary payment by the grantee of valid debts existing against the grantor, or the purchase of obligations against him, or even the payment of some money, subsequently, to the grantor, will not create a presumption in favor of the good faith of the grantee, or sustain the validity of the conveyance. Nor does the grantee, by such evidence alone, present a case which entitles him to demand, as a condition to the granting of relief to the creditors of such a grantor, by adjudging it void and directing a sale of the premises, and the satisfaction of a judgment creditor from the proceeds of the sale, that any provision should be made for the indemnity of the grantee for sums which he has voluntarily paid to parties having demands against the grantor. The complicity of the grantee in the fraud of the grantor deprives him of any right to relief in respect to such payments, from a court of equity. A grantee of a well known insolvent, who cannot show that he paid some present consideration at the time of the conveyance, or then secured or undertook by some promise to pay in future, cannot claim to be ignorant of the fraudulent intent of the grantor against his creditors. His innocence in such a case is against the well known presumptions as to human action. The point based upon the supposed want of knowledge of the fraud of the grantor in making the conveyance is not well taken.

An exception was taken at the trial, on the part of the defendant Hunt, on account of the refusal of the court to allow the said defendant to be sworn and examined as a witness in his own behalf. The defendant Moultrie, the husband of

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one of the children and heirs at law of Hunt, sen., who was also a party defendant, had been examined as a witness for the plaintiffs. The case made by the complaint shows that all the heirs at law of Hunt, sen., are united in interest. It is true, the defendant Hunt, jun., denies the allegations which prove the unity of the interest of the heirs, and claims to own the premises in question in his own right, by the conveyance from Hunt, sen. The plaintiffs cannot be permitted to depart from the case made by their own complaint, and adopt, for the purpose of their objection, the case made by the answer of Hunt, jun.

According to the provisions of section 397 of the code, the defendant Hunt was authorized to give evidence as a witness in his own behalf, because Moultrie, who had been examined as a witness for the plaintiffs, and the defendant Hunt, were co-defendants in the action and united in interest. (*Buchanan v. Morrell*, 1 *Bosw.* 602.)

The plaintiffs however bring this action as the executors of a deceased person, and section 399 contained a provision, when this action was tried, enacted in 1857, which declared that a party to an action should not be examined as a witness in his own behalf where the opposite party was an executor of a deceased person. (*See Sess. Laws*, 1857, vol. 1, p. 744.) This provision has since been somewhat modified, in 1860, shortly after the trial herein, and again in 1862. Certain alterations and additions were made to the section in 1858 and in 1859, but the particular provision referred to continued in full force from 1857 until after the trial of this action, which occurred in January, 1860. The operation of these two sections of the code is in direct conflict in this particular case. The provision last enacted must prevail, as the last expression of the legislative will.

The latter clause of section 397, under which the defendant Hunt claims the right of giving evidence in his own behalf, was enacted in 1852. (*See Sess. Laws*, p. 662.) Under this rule the claim of the defendant Hunt to give evidence in

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his own behalf was not sound, and the exception taken in that respect will not avail him.

Another objection is urged arising from the form and directions of the judgment. A sale of the real estate described in the conveyance before referred to is directed by the judgment herein, and that from the proceeds the judgments recovered by the plaintiffs' testator against Hunt, sen., together with the costs of the action, be satisfied, and that the surplus, if any, be deposited in the trust company; and in case the proceeds of the sale shall prove insufficient for the payment of the plaintiffs' said demands and costs, the judgment further directs an accounting by the defendant Hunt of the rents and profits of the premises since they were conveyed to him. Those provisions are irregular.

1st. The provision for an accounting prevents a final judgment from which an appeal can be taken, and a stay of proceedings had until after the accounting. Something remains to be done before judgment, viz. the taking of an account. The judgment is therefore interlocutory. The sale of the premises, according to the judgment, must take place before the accounting. The defendant will be deprived of the right of appeal until after the premises, which he claims the right to hold as his own, have been sold and taken from his possession.

2d. The proceeds of the sale of the premises, after satisfying the judgments of the plaintiffs' testator and the costs of this action, belong to the defendant Hunt, and the judgment should direct the payment of the surplus to him. The conveyance adjudged to be void as against the plaintiffs, is valid as between the parties thereto.

The defendants' counsel insist that these errors and informalities of the judgment amount to a mistrial. The facts and conclusions of law found by the judge at the trial do not afford the authority for inserting the provisions referred to, in the judgment which has been entered. The learned jus-

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tice who tried the cause would no doubt have corrected these informalities had his attention been called to them.

There is nothing before the court showing that any objection was made to the form of the judgment when it was settled, or at any time before it was entered. The judgment might have been brought before the court for correction in this respect, by appeal, under subdivisions 3 and 4 of section 349 of the code, as from an order. The appeal herein ought indeed to be treated only as an appeal under the section of the code just mentioned.

If the judgment were to stand as regular, it is not appealable on the merits, because of its interlocutory character above referred to.

The merits of the exceptions taken have been considered, because it was heard as an enumerated motion without objection. The errors in the judgment are those of form only, and should be corrected, but a mistrial is not thereby involved. The judgment must be modified in the manner indicated, as to its form, and the judgment so modified should be affirmed without costs.

The order of March 16, 1861, is not appealable. The application was for favor, which was denied.

The appeal from this order is dismissed, with \$10 costs.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Leonard and Barnard*, Justices.]

W. H. BOWNE and T. B. BOWNE vs. CHARLES DOUGLASS.

In an action by indorsees, against the first indorser of a promissory note, who indorsed the same as "assignee," it being proved that the defendant was assignee of an insolvent estate; that the note was received in compromise of a note belonging to that estate; that it appeared on the note that it was payable to the defendant as assignee, and was indorsed by him in that capacity; *Held* that the indorsement operated to transfer the title to the note, without making the indorser personally liable.

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a valid claim against his estate in the hands of the defendant, as assignee; and that the defendant, in receiving from the said Dunn & Mansur the note which is the subject of the present action, and in indorsing and delivering the same to the said George Baker, acted solely in a representative capacity, as assignee of said Thomas Douglass, having no beneficial interest in the note, or in the transaction upon which it was given and negotiated, of which the said George Baker had actual notice. From the foregoing facts, the conclusions of law were as follows :

First. That the defendant, in receiving from the makers the note in question, and in indorsing and delivering the same, acted in a representative capacity, to wit, as the assignee of the insolvent, and had no personal interest in said note, nor in the consideration for which it was given by the makers, nor in that for which it was received by the plaintiffs. *Second.* That the indorsement of the said note by the defendant, though sufficient to pass the legal title, so as to enable the indorsee to maintain an action upon it against the makers, was a restrictive indorsement, upon which the defendant was not individually and personally liable. The justice therefore ordered judgment for the defendant, with costs, and the plaintiffs appealed.

Robt. Benner, for the appellants.

Carpentier & Beach, for the defendant.

By the Court, INGRAHAM, P. J. The defendant in this case is sued as the indorser of a promissory note made payable to his order as assignee, and indorsed by him in these words: "Charles Douglass, assignee." The note was received by him in payment of a note belonging to him as assignee of Thomas Douglass. The only question in the case is as to the liability of the defendant as indorser.

Where a person signs a note as maker, the addition to his

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name of any special character in which he may be acting does not relieve him from personal liability as maker, but such addition is considered merely as *descriptio personæ*, and not as limiting or restricting the maker's liability. (*Moss v. Livingston*, 4 N. Y. Rep. 208. *Brockway v. Allen*, 17 Wend. 40.) And so where a bill is drawn on an individual with the addition of such an employment, and he accepts the bill in the same form, he is liable. And the same rule is applied to the case of one who indorses paper, although he adds a special character to his signature, when the note was not made payable to him in that capacity. (*Ticknor v. Allen*, 3 E. D. Smith, 561.) In such a case the indorsement is the same as making a new note; and the holder has no knowledge that the note is held for any other purpose than that of the individual indorsing it.

But where the note is made payable to any one in such qualified character, and he indorses it in the same way, a different rule prevails. This rule was distinctly held by Denio, J. in *Babcock et al. v. Beman*, (1 Kern. 200.) There the note was made payable to R. Beman, treasurer, and was so indorsed by him, and the indorsement was held to be a qualified indorsement for the purpose of passing the title to the note, and not containing a contract to pay. The same principle was held in *Mott v. Hicks*, (1 Cowen, 514.) And in *Hicks v. Hinde*, (9 Barb. 528,) it was applied to the drawer of a draft, who was considered to be liable as a surety, the same as an indorser. The court held that a party might add restrictive words to qualify his liability. (See also *Brockway v. Allen*, 17 Wend. 41; *Wateroliet Bank v. White*, 1 Denio, 608.)

In *The Bank of Geneva v. Patchin Bank*, (19 N. Y. Rep. 312,) this question was fully examined. Judge Denio says: "In the absence of any evidence to connect the bill with the defendants' bank, the indorser would be regarded as payee, and the abbreviation (cash.) affixed to his name, would be

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considered as *descriptio personæ*. But when it has been shown that he was the defendants' cashier, the presumption would be that the note payable in that form was the property of the bank; and when the indorser indorsed it with the addition mentioned, he sent it, &c. for discount, &c. The indorsement of Stokes, on this fact being shown, was the indorsement of the bank, and not Stokes' individual act."

In the present case it was proven that the defendant was assignee of an insolvent estate; that the note was received in compromise of a note belonging to that estate; that it appeared on the note that it was payable to the defendant as assignee, and was indorsed by him in that capacity. Such indorsement does not make him personally liable, but operates to transfer the title to the note.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Barnard and Clerke*, Justices.]

VAN VLECK *vs.* CLARK and others.

It is not necessary now to commence one action to stay proceedings in another.

And where a party has a remedy, which he neglects to apply for until it is too late to obtain the relief he wants, he should not afterwards, without any excuse for his delay in the first instance, be allowed to resort to a new action for that purpose.

Where a non-resident party gives security for costs on commencing the action and on bringing an appeal, the costs are not payable and cannot be collected until the appeal is decided. And the defendant should not be allowed to sue on the bond given as security for costs, to recover moneys which he is not permitted to collect directly, by execution.

But if an action is brought upon the bond, in another court, before the appeal is decided, the plaintiff in the original suit may move for an order in that suit, staying the second action until the decision of the appeal. If, instead of doing this, he defends the action brought upon the bond and a decision is made against him there, he cannot seek the aid of the court in the original action, by injunction.

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APPEALS, by the plaintiff, from an order made at a special term dissolving an injunction, and from an order denying a motion to stay proceedings in an action pending in the district court of the city of New York.

By the Court, INGRAHAM, P. J. The plaintiff, a non-resident of the state, on commencing an action against the defendants, was compelled to file security for costs. The action was tried, and resulted in a judgment for the defendants. From this judgment the plaintiff appealed, and filed security on the appeal. The defendants commenced an action against the plaintiff and his surety, in a district court of the city of New York, upon the bond given as security for costs, and this action is brought to obtain an injunction against the prosecution of that action until the appeal shall be decided. In the second action the defendants moved to stay the proceedings on the judgment in the district court recovered upon the bond given in that action for security for costs. The motion to dissolve the injunction was granted, and the motion for the order to stay was denied, and the plaintiff appealed.

The costs, which are the subject of controversy on these motions, were not payable and could not be collected after the security on the appeal was perfected, until that appeal was decided. The defendants should not be allowed to collect on the bond given as security for costs, moneys which he is not allowed to collect directly by execution. The difficulty arises from the action on the bond being brought in a district court, where relief cannot be granted unless the appeal can be pleaded as a defense to the action on the bond.

The plaintiff might have moved in the original action, before a judgment was recovered on the bond, for an order staying any action on the same until the decision of the appeal. As the parties were still suitors in this court, where the bond was given, and the bond was on file with the clerk of the court, such an order would have been binding on the

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defendants, and obedience to it could have been compelled. Instead of making this application, the plaintiff went to the district court and tried the cause there, and after a decision against him he seeks the aid of the court by way of injunction, in this suit. The remedy was as before intimated. It is not necessary now to commence one action to stay proceedings in another. And where a party has a remedy, which he neglects to apply for until it is too late to obtain the relief he wants, he should not afterwards, without any excuse for his delay in the first instance, be allowed to resort to a new action for that purpose.

The second motion appealed from is for a stay of proceedings on the judgment in the district court. By the recovery of judgment there, the case is beyond the reach of this court. We have no control over the judgments of the district courts. An order to stay proceedings on a judgment there would be inoperative. The court might order the bond to be canceled, but that would not affect the judgment recovered upon it in another court. The motion for relief in this court is too late. As the plaintiff has pleaded the matter in the action in the district court, and appealed to the common pleas, in that case, it is unnecessary for us to express any opinion on the sufficiency of the defense. The common pleas is the appropriate tribunal to decide that question.

We think neither of the remedies sought by the plaintiff was appropriate or proper, and that the decisions appealed from were correct and should be affirmed. We allow costs on one appeal, \$10.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Barnard and Clarke*, Justices.]

VAN DINE, assignee, &c. *vs.* WILLETT, Sheriff &c.

Where an assignment for the benefit of creditors conveyed to the assignee all the "goods, chattels, merchandise, &c., and property of every name and nature whatsoever," of the assignor; *Held* that these words were sufficient to include all the property of the assignor, wherever it might be, whether on land or at sea, and embraced saws ordered by the assignor to be manufactured for him in England, which were on their voyage to this country at the date of the assignment.

And the assignee having elected to accept the goods, as was evidenced by his paying the duties, and the purchase money; *Held* that the interest of the assignor in the property was at an end, from that time, and the title was in the assignee. And that a sheriff levying upon and taking the property, after that, as the property of the assignor, was a trespasser.

A direction, in an assignment, to the assignee to pay the rent, taxes and assessments on the real estate until the same shall be sold, is a power necessary to the preservation of the property, and one which the assignee would be authorized to exercise, if it were not included in the assignment.

A provision, in an assignment, authorizing the payment of debts, bonds, notes and sums of money due and to grow due from the assignor to the assignee, cannot be made to cover debts not then in existence, and will not, therefore, invalidate the assignment.

Nor will the authority to the assignee to employ an attorney render an assignment invalid.

APPEAL from an order made at a special term, denying the plaintiff's motion for a new trial. The action was for the claim and delivery of one cask containing thirty-nine dozen of saws. It was brought by the plaintiff, as assignee of Jacob V. D. Wyckoff, in an assignment for the benefit of creditors. The defendant justified the taking, under and by virtue of an attachment issued to him as sheriff, against the property of Jacob V. D. Wyckoff, in an action brought by one John Marsden, and alleged that the assignment, under which the plaintiff claimed the property, was fraudulent and void as against the creditors of the assignor. At the close of the plaintiff's testimony, the defendant's counsel moved for a nonsuit, on the grounds: 1. That the property in question did not pass, under the assignment; 2. That the plaintiff had shown no title to the goods in himself; 3. That the assignment was void on its face, as against creditors. The

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court granted the motion, and the jury assessed the value of the property at \$310. A motion for a new trial was denied, and the plaintiff appealed.

John O. Robinson, for the appellant.

Brown, Hall & Vanderpoel, for the respondent.

By the Court, INGRAHAM, P. J. The property in controversy in this action was ordered by the assignor to be manufactured for him, in England, prior to the execution of the assignment. It did not arrive here until after that date. On the arrival of the goods here they were sent to the public store, and were afterwards entered in the name of the assignor on behalf of the assignee, who paid the duties, and who subsequently paid the contract price for the goods, to the manufacturer. The defendant levied upon the goods in behalf of a judgment creditor. The plaintiff claims the goods as assignee, and the defendant resists the claim, 1. On the ground that no title passed to the assignee, under the assignment. 2. That the assignment was void.

At the time of the execution of the assignment the contract for the manufacture of the goods had been made, the orders had been sent, and the subsequent delivery proves that the orders had been accepted. The assignor therefore had a claim to have the goods manufactured, which he could enforce, and which contract he could assign. Whatever interest he had, under the contract, passed under the assignment, to the assignee. The assignee was not bound to accept such an assignment, and he might, undoubtedly, have refused to accept the goods; and would not, in such a case, have been liable to the manufacturer, for the purchase money. But he elected to accept the goods, which is evidenced by his payment of the duties and the purchase money. This election was before the levy by the sheriff, and whatever doubt there might have been if the levy had been made before the assignee

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had elected to take the assignment and comply with the terms of the contract, as soon as such election was made, the interest of the assignor in the property was at an end, and the title was in the assignee. After that, the sheriff was a trespasser in taking the property as the property of the assignor.

The facts, as proven, show the delivery by the manufacturer to the assignor on board of the vessel subject of course to his right to stop the goods in transitu, but which right was not exercised, and the goods reached the place of destination.

Both parties must be considered as conceding that the assignor obtained title to the goods as soon as they were placed on board of the vessel in pursuance of the orders before given, for their manufacture, as both claim under his possession.

As to all the world, except the vendor, the title passed to the assignor, and no other person could dispute that title. The assignment conveyed all the goods, chattels, merchandise, &c., and property of every name and nature whatsoever, of the assignor. These words were sufficient to include all the property of the assignor, wherever it might be; and I see no reason why it did not include any property belonging to him on board of a ship, as well as in his store. If any measures had been taken to rescind the contract, that might have defeated the plaintiff's title; but as no such proceedings took place, the title of the assignor was not impaired, and whatever title he had passed to his assignee under the assignment.

The fact of the entry being made in the name of the assignor for the use and under the direction of the assignee, who paid the duties thereon, would not deprive the plaintiff of title to the goods, if that title had passed under the assignment previously. There is no ground for imputing any fraud to the assignee on that account.

The other ground alleged by the defendant for dismissing the complaint was that the assignment was void.

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1. The direction to pay the rents and taxes on the real estate until sold, was a necessary power to preserve the property; and the assignee would have been authorized to do it if the authority was not included in the instrument itself. It is true, as held in *Carter v. Hammett*, (12 Barb. 254,) that the assignee had a right to elect whether he would accept an assignment of a lease, so as to make himself liable for rent to the landlord, but if he refused to accept, the authority to pay rent and taxes would become imperative, while the acceptance would make him liable until sale, whether the assignment authorized payment of the rent or not.

2. It is objected that the assignment authorizes the payment of debts due and to grow due. The defendant's counsel admits that if this had been confined to debts for which the assignee (who was intended to be secured) was at the time liable, it would be good. The assignment will bear no other construction. It authorizes the payment of debts, bonds, notes and sums of money due and to grow due. Whether they were payable at the time or not, would be immaterial. The assignment expressly confines the payment to debts &c. for which the assignor was then liable to the assignee. It could not in any way be made to cover debts not then in existence.

3. The authority to employ an attorney is also objected to. The appointment of an attorney does not authorize the assignee to substitute any one in his place. He still remains liable and bound to act as principal. Any discretion must be exercised by him and on his responsibility. Whatever an attorney does in the business is considered as done by the assignee. That he might employ an attorney without any express authority is undoubted. The authority given to do so does not in any way invalidate the assignment. The case referred to in *Planck v. Schermerhorn* (3 Barb. Ch. Rep. 644) was a case where the assignee had a right to name a successor, not appoint an attorney.

I see no reason for holding the assignment void as matter

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of law. If there was any fraud in fact the question was for the jury, and not for the court.

My conclusion is that the court erred in dismissing the complaint, and that the judgment should be reversed, and a new trial ordered. Costs to abide the event.

[NEW YORK GENERAL TERM, September 15, 1862. *Ingraham, Leonard and Clerke, Justices.*]

THE PEOPLE, *ex rel.* William R. Barton and John Ames,
vs. THE RENSSELAER INSURANCE COMPANY and EUGENE
 HYATT, receiver, &c.

Premium notes, taken by a mutual insurance company, upon policies already issued, and payable not at the end of or within twelve months from date, but in such portions and at such times as the directors shall require, are not sufficient to constitute a basis of capital for the renewal or extension of the corporation under the act of 1849. (*Laws of 1849, chap. 808.*)

It will not be *presumed* that notes in that form were contributed and designed for the purpose of constituting a basis of capital, but such intention must be *proved* by satisfactory evidence.

The use of such notes by the directors for the purpose of extending the charter of the company, under the act of 1849, being radically different from the purpose for which they were originally given, and for which they were intended to be used, it is an unjustifiable *diversion* of the notes, which will constitute a defense on the part of the makers to their enforcement, if attempted without the occurrence of any assessment; unless a consent was given to such diversion.

The certificate of the comptroller, specified in the 11th section of the act of 1849, confers upon the company only an apparent and *prima facie* right to enter upon the business of insurance. It was not intended and has not the effect to commit the state, by an official and conclusive admission on its part that the company is absolutely entitled to the exercise of corporate privileges for thirty years; and was not designed to be a bar to an action in the name of the people brought for a dissolution of the company for non-compliance with the conditions precedent to its valid incorporation.

An act of the legislature, authorizing a fire insurance company, on certain conditions, to take marine risks, is not a legislative recognition of the valid incorporation of the company, under the act of 1849.

The appointment of a receiver of an insurance company, by the court, and

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the consequent partial assumption and control by the court of the affairs and funds of the company, is not a judicial recognition of the due incorporation of the company, or an estoppel upon proceedings for a violation of the law of its existence.

Notwithstanding a receiver of an insurance company has been appointed, on account of its alleged insolvency, the corporation is to be deemed *acting* as a corporation, for the purpose of authorizing an action to be brought against it, under the 3d subdivision of section 432 of the code.

If a corporation does not comply with the fundamental requisites of the act creating it, it *offends* against its provisions and is liable to an action, under section 430 of the code, for the purpose of vacating the charter or annulling the existence of the corporation.

When a judgment is pronounced against an insurance company, adjudging it to have no legal existence, and directing its charter to be vacated, the receiver of the corporation will be prohibited from bringing any new suits; but the court will not, in such action, interfere with suits already instituted and in progress; but will leave the parties in such suits to apply therein for a stay of proceedings or other relief.

THIS action was brought for the purpose of vacating the charter of the Rensselaer Insurance Company, and to prohibit the company from further acting as a corporation, and to restrain the receiver from further action in the collection of the notes held by him, belonging to the company. The action was tried at the Rensselaer circuit. The following facts were found by the justice before whom it was tried: That the Rensselaer County Mutual Insurance Company was incorporated by an act of the legislature, passed April 29, 1836, for the purpose of making insurance upon buildings and other property against loss or damage by fire. That said corporation went into operation soon thereafter as a mutual insurance company, and continued to do business as such until the 17th day of October, 1851. That on or about the 29th day of September, 1851, the directors of the company presented a certain proposed charter and declaration to the attorney general of this state, for the purpose of extending the original charter of said "Rensselaer County Mutual Insurance Company" to the time specified by the provisions of the act, entitled "An act to provide for the incorporation of insurance companies," passed April 10th, 1849; which

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declaration was under the corporate seal of the company, and was signed by the president and all the directors thereof. That previous to the presentation of said charter and declaration, and on or about the 31st day of December, 1850, the directors of said company gave their consent in writing, subscribed by them, to such extension of the charter of the company, and published notice of the intention of said company to extend its charter, in a newspaper, as required by the act of 1849. That thereupon Levi S. Chatfield, then attorney general of said state, made a certificate, and the comptroller appointed commissioners to make an examination of the capital, securities and affairs of said company, as stated in the complaint. That such commissioners made a certificate and annexed thereto an affidavit, as stated in said complaint. That upon said certificate and affidavit being presented to him, on the 15th day of October, 1851, the said comptroller made a certificate in substance that it appeared from the report of the commissioners that the company had received and was in the actual possession of premium notes, based on applications for insurance, to the full extent required by the fifth section of the act of 1849, to wit, \$100,000. That on the 15th of October, 1851, the said charter and certificate were filed in the office of the secretary of state of this state, and on that day a certified copy thereof was made, under the seal of said office, and the same was filed in the office of the clerk of the county of Rensselaer on the 17th October, 1851. That by the terms of the charter last mentioned, the village of Lansingburgh, in the county of Rensselaer, was named as the place where the office of the said company should be located, and where the general business of the company should be conducted and carried on; that the corporate name thereof should thereafter be "The Rensselaer Insurance Company;" that its charter should be of thirty years' duration; that its business should be conducted on the plan of mutual insurance, for the purpose of making insurance against loss or damage by fire and risks of inland navigation

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and transportation, as provided in the second subdivision of the first section of the act of April 10, 1849. That any person applying for insurance might pay a definite sum in money, to be fixed by the board of directors, in full for said insurance and in lieu of a promissory note. That the company continued doing business during the application and proceedings for the extension of its charter. That it continued business and issued policies at the time of the extended charter, which was filed the 17th day of October, 1851. The first meeting of the board of directors of said company, entered upon the books after the filing of the extended charter, was held October 23d, 1851. Four policies were issued between October 16th and October 24th, 1851, viz: one on the 20th, two on the 21st and two on the 22d of October, 1851. That it did business and issued policies in the name of the Rensselaer Insurance Company, and after its reorganization acted under and in pursuance of its extended charter. That said company did a large business, and issued policies upon both the note and cash plan, but it took no inland navigation or transportation risks. The said company continued to do business till about the 1st day of February, 1855. That the capital upon which said company obtained an extension of its charter was its premium notes on hand, taken for policies already issued, and upon no other capital. That previous to the extension of the charter of said company the directors caused a printed circular, in which, among other things, it was stated that they intended to take steps to procure such extension, to be sent by mail to each member of said corporation according to his or her post-office address, as contained in his or her application for insurance. That by the charter and by-laws of said corporation it is provided that an annual meeting of the members thereof shall be held at its office, in the village of Lansingburgh, on the first Monday of June in each year, of which notice is required to be published. At which annual meetings directors are to be elected for the ensuing year, and such other

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business transacted as may be brought before them. All of which annual meetings, down to the time said company stopped business, were held, notice thereof being duly published. That no objection was ever made by any member of said corporation at any or either of said annual meetings, or any other time or place, to the extension of said charter, or the proceedings had therefor; that such extension was generally known, but it did not appear that the makers of such notes knew or consented to their use for such extensions, otherwise than is to be inferred from said printed circular. That in 1852 (*Laws of 1852, chap. 313*) the legislature passed an act amendatory of the extended charter of said company. That on or about the 19th day of January, 1853, the company issued a policy of insurance to one Thomas Shaughnessy, insuring his dwelling house, situate in the city of Troy, against loss or damage by fire. That said dwelling house, during the life of said policy, was burned, and a judgment obtained by said Shaughnessy against the company for said loss, in the supreme court, on the 26th of December, 1854. That an execution issued on said judgment to the sheriff of the county of Rensselaer was returned by him wholly unsatisfied, on or about the first of February, 1855; whereupon said Shaughnessy brought an action in this court, on behalf of himself and all others similarly situated, for the sequestration of the property and effects of said corporation, the appointment of a receiver thereof, and the application of the same to the payment of its debts. And such proceedings were thereupon had that the defendant Hyatt was by the judgment and order of this court, bearing date the 19th day of February, 1855, appointed such receiver; that he gave security as required, and immediately entered upon his duties as such receiver, took possession of the property and effects of the corporation, ascertained its liabilities, and proposed an assessment of its premium notes towards their payment, which was sanctioned by this court, and directed to be enforced and collected, by an ex

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parte order bearing date the 10th day of November, 1855. That the liability of said company for losses, at the time of the appointment of said receiver, was about \$100,000. That its assets at that time, which came to the hands of the receiver, consisted entirely of premium notes which, if all collected, would produce about the sum of \$65,000. That the corporation had done no act since the appointment of said Hyatt as its receiver, and the defendant Hyatt had done nothing except in pursuance of the order of the court aforesaid appointing him such receiver; that in the performance of his duties, as such receiver, he had brought numerous actions in this court for the purpose of enforcing the payment of said assessment, most of which are now pending. That said actions are upon notes given to said company, both before and after it extended its charter. This action was commenced on the 23d of October, 1861.

The justice found and decided, as conclusions of law, that the proceedings had before the extension of the charter of the Rensselaer County Mutual Insurance Company were insufficient for that purpose, and that its charter was not extended. That its premium notes taken for policies issued, payable as assessed and requiring assessment, were not capital premiums or engagements of insurance within the meaning of the act of 1849, and that said company could not use said notes as a basis for extending its charter. He therefore directed a judgment to be entered adjudging and decreeing that the corporation was not extended by the proceedings had for that purpose, and never had any legal existence under said extended charter; and that the said extended charter and the existence of the said corporation under the same be annulled, and said extended charter vacated.

E. F. Bullard, C. J. Lansing, D. L. Seymour and C. B. Ingalls, for the plaintiffs.

W. A. Beach and C. F. Tabor, for the defendants.

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HOGEBROOM, J. To entitle a mutual insurance company to commence business as an incorporation, under the act of 1849, (*Laws of 1849, chap. 308,*) agreements for insurance must be entered into, the *premiums* on which shall amount to \$100,000, and notes received therefor in *advance* payable at the end of or within twelve months from the date thereof. (*Sec. 5.*) These notes constitute the capital stock, or part of it, and by the same section are to be deemed valid, negotiable and collectible for the purpose of paying any losses which may accrue or otherwise.

By section 14 of the same act, existing mutual insurance companies were permitted to *extend* their original charters to the time specified by the provisions of said act, (which was thirty years, section 15,) by altering or amending the same so as to accord with the provisions of said act, filing the same together with a declaration of its directors of their desire for such extension, and the unanimous consent of the trustees as required by the act, and thereupon the *same proceedings were required to be had* as were necessary to the organization of original companies under said act. That is, a charter was to be prepared, submitted to and approved by the attorney general, and an examination had by or under the direction of the comptroller and the certificate of himself, or commissioners appointed by him, to make the examination obtained, that the company "has received and is in actual possession of the *capital premiums or engagements* of insurance, as the case may be, to the full extent required by the fifth section of the act."

No *capital* is mentioned under the 5th section of the act, other than that derived from the before mentioned notes received in advance for the premiums on the risks of insurance. No *premiums* are mentioned, except those last referred to, which I understand to be premium notes given for insurances made or contemplated by the makers thereof. Very possibly it would not be a violation of the statute to receive cash to an equivalent amount in lieu of the notes

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which would fall due at the end of a year if not sooner, and might thus necessarily place *cash* in the hands of the company, which, together with any funds accumulated in its business, by another section (8), is authorized to be invested in bonds and mortgages. Nor are engagements, by that designation, mentioned elsewhere in the act. I construe them to mean *agreements* or accepted applications for insurance.

Existing companies, then, desiring to obtain the advantages of this act, and to extend their charters under it, must be possessed of the elements of capital to the full extent required by the fifth section of the act, and I think of the *nature* required by that section, because the same proceedings were by the fourteenth section to be had for extending the charter of existing companies as were required in the case of original companies, for their organization. Moreover, as the act of 1849 adopted several features in regard to the constitution of those companies—particularly in regard to the notes forming the capital—essentially different from those which had therefore prevailed, and was apparently designed to institute a new and uniform mode of organization for the future, it would seem as if the legislature intended that all companies who desired to obtain the benefit of its privileges should substantially conform to the fundamental conditions of organization. I do not think the language of the fourteenth section admits of any other plausible or reasonable interpretation, especially when taken in connection with the provision at the close of the section for changing a mutual company into a joint stock company, which it says may be done “by proceeding in accordance with, and conforming their charter to, the provisions of this act.”

I do not think the notes presented by the Rensselaer Mutual Insurance Company to the commissioners appointed by the comptroller, and relied upon by the company as the justification of the attempted extension of their charter,

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were such as were contemplated or required by the act of 1849. 1. They were entirely different in form, time of payment and contents from those described in the act of 1849, as the basis of capital. The latter were to be payable at the end of or within twelve months from date, were to be immediately negotiable and collectible, and were to be deemed payable absolutely; (*White v. Haight*, 16 *N. Y. Rep.* 324; *Dana v. Munson*, 23 *id.* 566;) the former were to be payable in such portions and at such times as the directors, agreeably to their charter and by-laws, should require, were not payable absolutely, but only in the contingency of a loss, and then only upon a regular assessment made by the company pursuant to their charter and by-laws. It is true, notes in the latter form have been held sufficient to constitute capital under the act of 1849, where the evidence is satisfactory that they were contributed and designed for such a purpose; (*White v. Haight*, 16 *N. Y. Rep.* 310; *Dana v. Munson*, 23 *id.* 566; *Sands v. St. John*, 36 *Barb.* 635;) but presumptively this is otherwise; (*Dana v. Munson*, *supra*; *Birdseye v. Smith*, 32 *Barb.* 217; *Sands v. St. John*, *supra*;) and there is no evidence whatever in this case that they were designed for any such object. On the contrary, the evidence is clear and unquestionable that they were given wholly under the act of 1836, and as a contingent fund to pay losses as they should be assessed from time to time, as such losses should occur; and not as a present capital, payable absolutely at their full amount, and liable to be immediately converted into cash at the pleasure of the directors.

2. The object for which they were originally given and for which they were intended to be used, being radically different from that to which they were appropriated by the action of the directors in the attempted extension of the charter, I think it was an unjustifiable *diversion* of the notes from the purpose for which they were made, and that this would constitute, in the hands of the makers, a legal defense against their enforcement if attempted without the occurrence of and

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assessment for losses as provided by the charter of 1836, unless a consent was given to such diversion. (*Bell v. Shibley*, 33 Barb. 610. *Dana v. Munson*, 23 N. Y. Rep. 568. *Beers v. Culver*, 1 Hill, 589. *Oliphant v. Mathews*, 16 Barb. 608.) And this I should think was never given. The notice sworn to have been sent by mail to each member of the company was not very specific in its character, and certainly did not express any design to use these notes as the basis of capital under the act of 1849; is not shown to have reached a single individual member of the company; and the mode of service is not of that kind from which its receipt by the members was necessarily to be inferred. To justify a diversion of a note from the purpose originally intended, the evidence of consent thereto should be clear and explicit, not doubtful or liable to misconstruction.

3. It is also, perhaps, worthy of consideration whether the provision in section 8 of the charter of 1851, for graduating the *amount* for which the note shall be given, and the times and mode of payment thereof by the determination of the directors; and further *exacting* the payment of such *cash* premium as shall be required by the by-laws of the company, (which by section 11 of the by-laws is fixed at 5 per cent of the note given for the premium;) and further providing that "any person applying for insurance may pay a *definite* sum to be *fixed by the board of directors in full* for said insurance, and in lieu of a promissory note;" is not inconsistent with the 5th section of the act of 1849, which provides for a sum to be fixed by the applicant, and which is payable absolutely and at a specific time, and to be in the shape of a note, (to be taken out in premiums,) and to be at the absolute control and the absolute property of the corporation, and not a mere *contingent* fund for the payment of losses, and whether such note is not on account of such inconsistency void. But perhaps this point has been wholly or partially disposed of by the decision of the court of appeals in *Mygatt v. N. Y. Protection Ins. Co.*, (21 N. Y. Rep. 52.)

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4. It is perhaps, also, worthy of consideration whether the clause in the 1st section of the charter, authorizing the taking of "risks of inland navigation and transportation," is not such an assumption of a new business and of increased risks as, if the notes already given for fire insurance are attempted to be applied in payment of losses arising from such new risks, will not *annul* the liability of the makers thereof.

But I do not deem it necessary to go at large into a consideration of these questions, as I deem the Rensselaer Insurance Company illegally incorporated, and the attempt of the Rensselaer County Mutual Insurance Company to extend their charter under the act of 1849, a failure by reason of the lack of any such capital as was contemplated and required by the 5th, 11th and 14th sections of the act of 1849.

It remains to consider whether any of the defenses set up on the part of the defendants against a dissolution of the corporation are valid; and

1st. As to the alleged official, legislative and judicial *recognition* of the validity of the incorporation and of the existence of this company. This is supposed to consist, (1,) in the approval of the charter by the attorney general and the certificate of the comptroller that it had premium notes to the full extent required by the 5th section of the act; (2,) in an amendment of the charter of the Rensselaer Insurance Company by the legislature in 1852; (3,) in the assumption of the guardianship and control of the affairs of the company by the appointment of a receiver, and otherwise, on the part of the court, acting for the sovereign power, and as a branch of the government.

(1.) The approval by the attorney general of the charter does not touch the question under discussion, and the certificate of the comptroller is a guarded and qualified one, and there is some doubt whether it comes up to the requirements of the 11th section of the act of 1849. But assuming that it does, I think it was no more than one of those *precautionary* steps sometimes taken for the purpose of preventing a

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bold and palpable violation of law ; that it only conferred an *apparent and prima facie* right to enter upon the business of insurance, and that it was not intended, nor has it the effect, to *commit* the state by an official and conclusive *admission*, on its part, that the defendants are absolutely entitled to the exercise of corporate privileges for thirty years, and was not designed as a bar to an action like the present for a dissolution of the company for non-compliance with the conditions precedent to its valid incorporation. (*See The People v. The Kingston and Middletown Turnpike Company*, 23 *Wend.* 210.)

(2.) In 1852 (*Laws of 1852, ch. 313*) the legislature authorized the Rensselaer Insurance Company, on certain conditions, to take marine risks, on complying with the first subdivision of the first section of the act of 1849. I do not regard this as a legislative recognition of the valid incorporation of the company under the act of 1849. The term Rensselaer Insurance Company was used mainly as matter of description ; there was a pretended corporation doing business under that name ; it applied for certain privileges, which were granted by the legislature. The latter did not inquire and were not called upon, I think, to inquire into the question whether it had complied with the prerequisites to its valid organization ; nor did it know of its violations of law, if any such there were. It would be a dangerous rule to construe every amendment of a charter into a conclusive legislative recognition of the valid existence of a corporation. At all events, it appears to me it should not reach beyond a waiver of previous forfeitures arising from its violations of law ; and not be regarded as a legislative license to pirate upon the community, if in fact found to be unsoundly or illegally organized. The case would of course be different if there had been a legislative examination into the questions here involved, and the legislature, with *full knowledge* (which is essential to a waiver of forfeitures) of its infraction of or non-compliance with the fundamental law of its existence, had

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chosen, notwithstanding, to continue and enlarge its powers and recognize its right to exercise its corporate franchises.

(3.) I am not able to look upon the appointment of a receiver by this court, and the consequent partial assumption and control by the court of the affairs or funds of the company, as any such recognition of the due incorporation of the defendants' company, or estoppel upon proceedings for a violation of the law of its existence, as is claimed by the defendants to flow therefrom. The court acts in this matter, according to the theory of the law, as in all others of judicial cognizance, as the impartial judge between litigating parties, whether such parties be only citizens or citizens and the state. Nor has it otherwise control or guardianship of the funds of the company than as preserving them from waste or loss for the benefit of parties interested. Notwithstanding, it is in one sense a branch of the government; it is so not as identical with the people themselves, but as furnishing a convenient medium for the enforcement of their rights.

2d. Another defense now relied upon in argument is the statute of limitations.

(1.) I do not think the statute of limitations was intended to be pleaded. On application for permission to plead, it had been refused at special term, and I cannot believe that respectable counsel would persist in pleading the statute in violation of the order of the court. The language now claimed to amount to a defense of the statute is not introduced as a separate defense, nor apparently as a substantive and independent averment, but rather as incidental and collateral to a defense of the defendant Hyatt. The language is as follows: "That the defendant Hyatt is not and has not been acting as a corporation, but in the performance of his duties only as such receiver as aforesaid, in winding up the affairs of the corporation, *which ceased all business more than six years before this suit was commenced, and which commenced business under its extended charter more than ten years previous to the time aforesaid.*" These averments, so far as they

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relate to the lapse of six years since the company ceased business, are conceded not to have been intended to set up the statute, and they are not inappropriate—at least not palpably so—in aid of one of the points raised on the argument, to wit, that this action is brought under section 432 of the code, and to maintain it under that section the offending parties must be shown to be *now acting* (that it is at the time of the commencement of the suit) *as a corporation*. The allegation was probably made to raise that point.

(2.) But if the statute of limitations was intended to be pleaded and can be considered, notwithstanding the order of the special term, I am of opinion that it does not constitute an *effectual* defense, as the case is presented before me; for, (1.) It may be doubted whether the limitation is applicable to the people in a case of this nature. (2.) The phrase supposed to set up the statute does not show a defense. The cause of action sued on did accrue within ten years after the commencement of the action. The usurpation of corporate powers constitutes a *continued* cause of action, and the *last* of the acts relied on to establish such usurpation it is not pretended took place more than ten years since. (*Code*, §§ 97, 98.) (3.) Moreover, so far as I recollect the evidence, it does not expressly appear that the commencement of business under the extended charter which would be when probably the first act of usurpation occurred, was more than ten years before the commencement of the action. I cannot therefore give effect to this defense.

3d. The remaining defense relied on by the defendants is, that this action is brought under the third subdivision of section 432 of the code, and that it has not been proved that the defendants or any association or number of persons *were acting* (at the commencement of the suit) *as a corporation* without being duly incorporated. While it is true that the defendant Hyatt was appointed a receiver of the Rensselaer Insurance Company on account of the alleged insolvency of the company, in 1855, I am of opinion, nevertheless, that

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the defendants come within the purview of the section quoted. Hyatt is acting as the representative of the company, and exercising the powers and doing the business of the company. He is making the *assessments* for losses and doing other acts which but for their insolvency the company alone could perform. He, and the company through him, are exercising some at least of the very powers which they derive their sole authority to exercise (if they have any authority at all) from the act of 1849. Moreover, as there has been no dissolution of the corporation, nor any adjudicated forfeiture of their rights and privileges, I do not see why it is not possible that the receiver may be ultimately displaced and the company be permitted to resume active operations, except by some proceeding similar to that now instituted.

But I also think the action is well brought under section 430 of the code, and particularly under subdivision one of that section, which is as follows: "Whenever such corporation shall, 1, offend against any of the provisions of the act or acts *creating*, altering or renewing such corporation." If the company does not comply with the fundamental requisites of the act creating the corporation, I think it *offends* against its provisions, and is liable under that section to an action (and the present is substantially of that character) for the purpose of vacating the charter or annulling the existence of the corporation. (*People v. Kingston and Middletown Turnpike Co.*, 23 *Wend.* 204.) It may be, also, that it is liable under the 5th subdivision of the same section, for "exercising franchises or privileges not conferred upon it by law;" although that subdivision appears more especially applicable to the case of a legally organized corporation usurping powers not conferred upon it by its charter or by-laws.

The result is, that this corporation must be adjudged to have no legal existence, and its existence must be annulled and its charter vacated, and it must cease to exercise the corporate powers, functions and privileges heretofore and now exercised and enjoyed by it or its receiver.

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And I think this judgment may appropriately cover the action of the Rensselaer Insurance Company, whether under that name or charter and the act of 1849, or under the name and charter of the Rensselaer Mutual Insurance Company and the act of 1836. In the latter capacity, its legal existence has terminated by lapse of time; in the former capacity, by the fact of its never having been duly incorporated. The corporate body is essentially the same, though acting under a different name and to some extent with different powers. I cannot think it necessary to institute a new action to accomplish this result.

I think, also, the judgment should extend to the receiver, and prohibit his future action and institution of suits as receiver of either company, under his present appointment. On the dissolution of the corporation, or on proceedings for that purpose, he or some other person may be appointed receiver to wind up its affairs.

But while I think the receiver should be enjoined from instituting any new action, I am not disposed, at least at present and in this action, to interfere with suits already instituted and in progress. I think the parties in those suits should be heard before their rights are affected. They are to be permitted, therefore, to apply, in those suits respectively, for such stay of proceedings or other relief consequent upon the determination in this action, as they shall deem themselves entitled to.

I am inclined to think the case is one where the defendants as well as the plaintiffs are entitled to their costs out of the fund in the hands of the receiver; but I will reserve that and all further questions not determined above, to be adjusted on the settlement of the same.

[RENSSELAER SPECIAL TERM, October 6, 1862. *Hogeboom*, Justice.]

VON LATHAM *vs.* LIBBY and ROWAN.

Where one makes a complaint before a police magistrate on a subject matter over which the magistrate has a general jurisdiction, and the magistrate thereupon issues a warrant, upon which the party complained of is arrested, the complainant is not liable, in an action for false imprisonment, although the facts stated in the complaint do not constitute a criminal offense, so as to give the magistrate authority to act in the particular case.

Where a party applying to a magistrate, having general jurisdiction of the subject matter, for a warrant of arrest, under the act of April 18, 1857, "to punish nuisances and malicious trespasses on lands," does no more than to state his case to the magistrate, in an affidavit, without bad faith or malice, he is not liable for the consequent action of the magistrate, even though it be erroneous.

APPEAL from a judgment of the city court of Brooklyn, and from an order subsequently made by that court, denying the defendants' motion for a new trial. The complaint alleged that on the 5th day of February, 1862, the defendants, at the city of Brooklyn, wrongfully and maliciously contriving and conspiring together to injure the plaintiff, caused and procured a warrant to be issued against and for the apprehension of the plaintiff, by William M. Boerum, Esq., a justice of the peace of said city, and for the purpose of procuring said warrant, and to subject the plaintiff to arrest and imprisonment thereunder, in pursuance of said contrivance and conspiracy, one of said defendants falsely made oath before said justice that in the month of November, 1861, at the city of Brooklyn, in the county of Kings, the plaintiff did unlawfully intrude, enter upon and take possession of the house situated and known as No. 12 Huntington street, in said city, without license or authority of William P. Libby, the owner thereof; and that said plaintiff had occupied and still continued to occupy said house, without the authority of the owner thereof, in violation of the statute in such cases made and provided; whereupon the said justice issued his warrant in due form of law against the plaintiff to an officer of the metropolitan police, who thereupon, in pursuance of the requirements thereof,

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arrested and imprisoned the plaintiff, and forced and compelled the plaintiff to go in custody as such prisoner, through a great many public streets and places in said city, to a certain police station house, building or prison, and there kept, detained and imprisoned the plaintiff for a long space of time, and took and compelled him to go before said justice, where the plaintiff was kept, detained and imprisoned in a public court room for a long space of time; that the plaintiff was forced and compelled on subsequent and other days and times to appear before said justice, for examination on said charge, which was finally dismissed by said justice, the defendants failing to appear and prosecute and sustain said charge, and the plaintiff was discharged therefrom. The plaintiff further charged that said charge was false and untrue; that there was no reasonable or probable cause therefor, or for the arrest, imprisonment and arraignment of the plaintiff, and the defendants well knew the same. That by reason of said charge, arrest and imprisonment, and the publication by the defendants thereof in a public newspaper, the plaintiff was greatly harassed and annoyed, and was damaged and injured in his good name and reputation, and in his rights and feelings, and was subject and held up to public scorn, infamy and disgrace, to his damage, &c.

The defendants, by their answer, admitted that they procured a warrant to be issued against the plaintiff, and that he was arrested by virtue thereof, and brought before Justice Boerum, as in the complaint alleged; but the defendants denied that the plaintiff was otherwise imprisoned under such warrant, or that the defendants unlawfully or maliciously, or by means of any false affidavit, or any conspiracy, procured the same to be issued. They averred that the facts set forth in the affidavit, upon which said warrant was founded, were true. That the defendant Libby was the owner of the premises referred to in the complaint at the time the plaintiff entered upon the same, and at the time the warrant was issued, or was entitled to the pos-

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session thereof, and that the plaintiff unlawfully and wrongfully entered into and obtained possession of said premises without the consent or authority of the defendants. The defendants denied every other allegation in the said complaint.

This action came on to trial before the city judge of Brooklyn and a jury, at the May term, 1862. The case having been opened by the counsel for the plaintiff, the counsel for the defendant moved the court to compel the plaintiff to elect whether he would proceed for false imprisonment or for a malicious prosecution. The court denied the motion. When the plaintiff rested, the defendants' counsel again moved the court to compel the plaintiff to elect which cause of action he would abide by. The court overruled the motion on the ground that by the proof the plaintiff rested his case on the ground of false imprisonment. The counsel for the defendants excepted. The counsel for the defendants then moved the court to dismiss the complaint, and for a nonsuit, upon the following grounds, namely: That the justice who issued the warrant had jurisdiction of the subject matter of the complaint; that the facts set forth in the affidavit were legal evidence and tended to make out a proper case, and the justice having decided that they made out a criminal offense and issued his warrant accordingly, such decision was conclusive, until revoked, and afforded a protection to the defendants. That the defendants having stated their case to the magistrate, and thereby merely put the court in motion, were not liable, in the absence of evidence that such statement was untrue or made in bad faith, or maliciously. The court denied the motion, and the counsel for the defendants excepted. The court charged the jury that the plaintiff had made out a cause of action for false imprisonment, and the only question for them to determine was the amount of damages; that the plaintiff was entitled to full compensation for the injuries actually sustained by him; that the jury might look into the evidence to ascer-

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tain whether the defendants were actuated by malicious motives towards the plaintiff, and if they believed the defendants were so actuated, they might give damages beyond the amount of injury actually sustained by the plaintiff by way of punishing the defendants, and that the amount of exemplary damages was within the discretion of the jury, to be reasonably and carefully exercised. The counsel for the defendants excepted to that portion of the charge which submitted to the jury the question whether the defendants were actuated by malicious motives. The jury rendered a verdict for the plaintiff, and assessed his damages at one thousand dollars. Thereupon the defendants moved at the same time for a new trial upon the minutes of the court, upon the following grounds, viz: 1st. That the defendants were not liable, for the reasons stated on the motion for a nonsuit. 2d. That the injuries sustained by the plaintiff were at most caused by the mistake of themselves and the magistrate, and the plaintiff was entitled only to the damages proved by him, and that the evidence did not warrant a verdict for so large an amount. 3d. That the damages were grossly excessive. The court denied the motion, with costs.

J. W. Gilbert, for the appellants.

James Troy, for the respondent.

By the Court, EMOTT, J. The complaint in this case seems to have been framed to state a cause of action for malicious prosecution, and the answer was probably drawn to meet such a case. At the trial, however, by the ruling of the judge, and apparently without objection by either party, the action was considered and tried as if brought for false imprisonment. The defendants' counsel insisted, at the outset, that the plaintiff should be compelled to elect whether he would proceed for false imprisonment or for malicious prosecution. Such

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an election, although refused by the judge at that stage of the trial, was in effect made by him for the party at the close of the testimony, when he is stated to have decided that the action rested on the ground of false imprisonment. The defendants' counsel did not except to this ruling, although he did except to the refusal to compel an election. The judge afterwards charged the jury that the plaintiff had made out a cause of action for false imprisonment, and to this instruction the defendants' counsel did not except. He also left it to the jury to determine, from the evidence, whether the defendants were actuated by malicious motives; adding that if the jury thought they were, they might give smart money, in the verdict against them. The defendants' counsel excepted to the submission of the question of malice to the jury, but he evidently did so with reference to its effect upon the question of damages, assuming that if there was no proof of actual malice, the plaintiff, although entitled to a verdict, should have recovered, for his unlawful imprisonment, his actual damages. Upon the theory, however, that the action was for a malicious prosecution, proof of actual malice was vital to the support of the action, and not merely to the question of damages. The question of malice, in such cases, is always a question of fact, and must be submitted to the jury, while a want of probable cause, which is equally essential to sustain such an action, is to be determined by the court as a question of law. In the present case the theory of an action for a malicious prosecution seems to have been abandoned by both parties, the plaintiff going for a false imprisonment under the intimation of the court, and the defendants omitting to ask for any ruling or instruction, or to take any exceptions which would raise the question whether a case of malicious prosecution was made out. I shall not therefore consider how far the evidence would sustain an action for malicious prosecution, or what disposition should be made of the various questions which might arise upon this evidence, if applied to such an action. The exception which has just been no-

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ticed to the remark of the judge that the jury might look into the evidence for proof of malice, would require some consideration upon the question of damages, if an action for false imprisonment will lie upon the facts here disclosed; but it will not be material to discuss that question until the liability of the defendants in such a form of action is first decided.

The only exception at the trial which can present this question is that taken to the refusal to nonsuit the plaintiff. The same question may possibly be presented by the motion for a new trial upon the minutes, although here the defendants would be embarrassed by the fact that a direct instruction to the jury that the action would lie was not excepted to; so that after all, upon the motion as well as upon this appeal, they must rely upon their motion for a nonsuit.

The facts in the case are few and undisputed. The defendant Libby was the owner of a house and lot in the city of Brooklyn, and the defendant Rowan seems to have been his agent. On the 5th day of February, 1862, Rowan made an affidavit before a police magistrate that the plaintiff had unlawfully intruded into and taken possession of the house owned by the defendant Libby, without his authority. Upon this affidavit the magistrate issued a warrant reciting the charge, and commanding the arrest of the plaintiff to answer it as a violation of the statute in such case. The plaintiff was arrested, and pleaded to the charge. He was suffered to go upon his own promise to appear, Rowan appearing against him. The case was adjourned three times, and upon the last hearing, Rowan not appearing, the complaint was dismissed and the plaintiff discharged. It will be seen that there is no proof connecting the defendant Libby directly with the transaction; and all that there is in the case to make him liable to the plaintiff in an action for false imprisonment, is the admission in the answer that he as well as the defendant Rowan procured the warrant to be issued upon which the plaintiff was arrested, and the fact appearing in the proceedings before the justice, that Libby was the owner

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of the house into which the plaintiff was charged with intruding.

The statute under which the proceedings against the plaintiff was taken is chapter 396 of the laws of 1857. (*Laws of 1857, vol. 1, p. 805.*) The first section of this act provides, among other things, that any person who should thereafter intrude upon any lot or piece of land situate within the bounds of any incorporated city or village, without the consent of the owner thereof, shall be deemed guilty of a misdemeanor. It is not disputed that the magistrate to whom the complaint was made, had general criminal jurisdiction to issue process for the arrest of persons charged with any crime or misdemeanor of whatever degree, nor that he had jurisdiction to try and to convict the plaintiff if he were guilty of an offense under this statute. The difficulty in the proceedings of the defendants which caused the complaint to be dismissed, seems to have been that the plaintiff was charged with intruding into a *house* and not upon a *lot of land*, and that Libby was not stated in the complaint or warrant to be the owner of any lot or piece of land. It is therefore contended that neither the affidavit nor the warrant states or shows the commission of any offense by the plaintiff, and for this reason the present defendants were held liable upon the trial of the present suit, for false imprisonment in the plaintiff's arrest.

The only connection of the defendants with the arrest or detention of the plaintiff, assuming that Libby is responsible in the same manner as Rowan, and for all his acts, is that they stated their case to the magistrate, charging the plaintiff with a misdemeanor upon the facts which they swore to, and asked for his arrest. The answer indeed states that they "procured the warrant to be issued," but as this answer was probably drawn to meet a charge of malicious prosecution, I think its statements and admissions should be conformed to or construed by the evidence, and not made the ground of a liability more extended than the proof warrants. There is

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no evidence of any undue interference to procure an arrest of the plaintiff, or of any thing more than a statement of the case to the magistrate, upon oath. The defendants are not shown to have participated personally in the arrest. Rowan appeared at two or three hearings before the magistrate to support it, but finally abandoned it, or for some reason failed to appear, and the case was dismissed by the justice.

It must be allowed that there is some uncertainty in the decisions, or perhaps in the language of judges, especially in our own courts, and in some recent cases, with reference to a question of this nature. In *Wilson v. Robinson* (6 How. Pr. R. 110) an answer to an action for false imprisonment, alleging that the defendant made a certain complaint to a magistrate averring a particular state of facts, upon affidavit, upon which the magistrate issued a warrant and the defendant was arrested, which was the imprisonment complained of, was held insufficient, upon demurrer. The argument was at special term, and the judge remarks that no criminal offense was charged in the affidavit or warrant, and none was pretended to have been committed. A case may undoubtedly be supposed where a complaint should be made and a warrant issued for an act plainly lawful. Such a proceeding could hardly be in good faith, and it is not necessary now to say that any one concerned in any way in such an arrest could not be sued for false imprisonment. But if this case would hold that a party who made a complaint to a magistrate in good faith charging a clearly criminal offense, would be liable for a consequent arrest made by the direction of the magistrate, because the facts stated or proved did not make out the offense, I should hesitate to accept the rule. The case of *Comfort v. Fulton* (13 Abb. 276) does not seem to have been very carefully considered. The action of false imprisonment could undoubtedly be sustained in such a case as that, upon the last ground intimated by Judge GOULD, that the defendants were conspicuous actors in the imprisonment of the plaintiff.

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There is another class of cases in which officers having a peculiar and limited jurisdiction to issue process of a special nature in certain cases, having arrested individuals by such process in cases not within such authority or jurisdiction, both the officers and the parties obtaining the process have been held liable for false imprisonment. Thus in *Curry v. Pringle*. (11 John. 444) the defendant procured from a justice a warrant instead of a summons, without any oath of the facts which would authorize the justice to issue a warrant, and when the plaintiff was not liable to arrest under the statute. So in *Bissell v. Gold*, (1 Wend. 210,) and in *Rogers v. Mulliner*, (6 id. 597.) But these were instances where the jurisdiction of the officer to issue such a process was special, and confined to cases which were brought within the statute creating it, and where no steps being taken to give or to show such a jurisdiction, the proceeding was absolutely without any authority or color of justification. *Vandenberg v. Hendricks* (17 Barb. 179) was a case of a similar nature against a defendant who had taken out a warrant under the non-imprisonment or fraudulent debtor act, upon an affidavit which was wholly insufficient to give the officer jurisdiction or authority to act. These cases are distinguishable from the present, because here the magistrate had a general jurisdiction of the subject matter, to wit, arrests of persons charged with crimes, and of the person of the accused. The affidavit of Rowan showed a wrongful act on the part of the plaintiff, which he claimed was an offense under the statute. Rowan is not shown to have done more than to state his case to the magistrate. There is nothing in the evidence to impute bad faith to him; nor do I find any evidence of actual malicious motives on his part. He may have been mistaken in supposing that the facts which he stated constituted an offense against the act referred to, or he may have omitted to state in his affidavit some fact which was necessary to constitute such an offense. But so long as he did no more than to state his case, and that without bad

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faith or malice, he was not in my opinion liable for the consequent action of the magistrate, even if it were erroneous. I do not say that he would be exempt from liability if he was shown to have acted maliciously and in bad faith, although the character and extent of his liability would present another question; but an erroneous view of the law or of his rights would not of itself convict him of bad faith. If his liability to an action depended upon his maliciousness and bad faith, that should have been submitted to a jury as the principal question, and there should be, as I have said, something more in the case to show it than the insufficiency of his allegations to establish the commission of a criminal offense. If the defendants had actively and personally participated in the arrest of the plaintiff a different rule would apply, as it would also if the act charged by them against the plaintiff had been clearly lawful and innocent. But I am not prepared to admit the doctrine that a party who merely states his case to a magistrate, complaining of a wrongful act as criminal, is liable to an action for false imprisonment if the magistrate upon that statement issues process which in the event cannot be justified by the law or the facts of the case.

The contrary rule has been expressly asserted by the highest authority in the English courts. Thus, in *Carratt v. Morley*, (1 A. & E., N.S. 18,) Morley sued Carratt, and obtained judgment by default and process against him in a court of requests, when his residence was in a wapentake which was expressly exempted from the jurisdiction of the court. Carratt afterwards brought false imprisonment against Morley, the commissioners of the court of requests who signed the warrant, and the officer who arrested him. The court of king's bench held that the commissioners and the officer were liable, but Morley, the plaintiff, was not; and Lord Denman said, "a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction." In *Barber v. Rollinson*, (1 Cr. & M. 330,) the defendant laid an information against the

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plaintiff charging him with a felony. Upon his arrest he was dismissed by the magistrate, on his promise to appear in a week. As he was leaving, the defendant interposed another charge, and he was again put to the bar and held under a similar promise. No foundation existed for the charges, and they were dismissed. But Lord Lyndhurst and the court of exchequer held that the defendant could not be made responsible for false imprisonment. In *West v. Smallwood*, (3 M. & W. 418,) Lord Abinger laid down the rule with great distinctness. That was a case quite similar to the present. The plaintiff was a builder; a dispute arose between him and the defendant for whom he was building; the plaintiff ceased work, and the defendant lodged a complaint with a magistrate and had him arrested under a special statute, known as the master and servant act. On a hearing the complaint was dismissed, the case not being within the act. The plaintiff then sued in trespass for false imprisonment, but was nonsuited at the trial. The nonsuit was sustained by the court of exchequer, and Lord Ch. B. Abinger said: "When a magistrate has general jurisdiction over the subject matter, and a party goes before him and lays a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action on the case if he has acted maliciously." Equally strong is the doctrine of the judges of the common pleas in *Brown v. Chapman*, (6 Man., Gr. & Sc. 365,) which was a case where an arrest had been made which was not justified by the facts. The court say: "The acts of the defendant appear to us no more than calling on the magistrate to exercise his jurisdiction;" and adds: "If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment; and that, although the magistrate had no

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jurisdiction." A similar principle was applied by the supreme court of this state, in *Stewart v. Hawley*, (21 Wend. 552.) A justice of the peace issued a warrant, and an officer arrested the plaintiff, for what was charged to be a violation of the act for the observance of Sunday. It was held that although the facts stated did not constitute such an offense, yet the magistrate and the officer were protected and could not be made responsible in trespass, but only for a malicious prosecution, if it were such. The rule as to the liability of a complainant in cases where the complaint is insufficient or unfounded, must be the same; and this is the rule, whether the error or the failure to sustain the charge of a criminal offense, be upon the law or the facts. If a man in good faith prefers a charge against another, upon which a magistrate causes his arrest, and the complainant fails to substantiate his charge by the evidence, he certainly is not liable to an action for false imprisonment. He is no more liable to such an action when he simply states the facts, and states them correctly to a magistrate having jurisdiction to arrest for the offense charged, and of the person accused, and the magistrate incorrectly concludes that an offense was committed, and so orders an arrest, which is subsequently terminated by the discharge of the accused because the magistrate was in error as to the law, and the facts did not constitute a crime. Any other rule would be most hazardous to innocent parties, who could never venture to make a criminal complaint without incurring the risk of an action for the arrest, if they were either mistaken as to the facts, or ill advised upon the law.

The general principle stated in the case of *The Marshalsea*, (10 Rep. 65, 76,) is not at variance with the views which have now been indicated. "Where a court," it is said by this venerable authority, "has jurisdiction of the cause, but proceeds '*inverso ordine*,' or erroneously, the party who sues, or the officer who executes the process or precept of the court, no action lies against them. But when the court has not

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jurisdiction of the cause the whole proceeding is *coram non judge*, and actions will lie against them without any regard of the precept or process." In the case of a criminal complaint to a competent magistrate, such an officer has jurisdiction of the cause. His jurisdiction does not depend upon any special condition precedent to his power to issue process, but is general, as that of a civil tribunal. He is to determine whether sufficient grounds exist in law and fact to arrest any person charged by another with a criminal offense. If such a magistrate determine to make, and proceed to direct such an arrest, a party who has merely stated the case to the magistrate is not a trespasser, although the arrest should be wholly unjustifiable in law or in fact.

In the present case the defendants were held liable to an action for false imprisonment because the facts which they stated to the justice did not constitute a criminal offense, and the latter erroneously held that they did, and thereupon arrested the defendant. I am of opinion that this would not sustain such an action; and that the very capable lawyer who presides in the city court of Brooklyn fell into an error in holding the defendants liable for false imprisonment, and refusing the nonsuit which was asked.

The judgment should be reversed and a new trial ordered in the city court.

[ORANGE GENERAL TERM, September 8, 1862. *Enott, Brown and Lott*, Justices.]

BALME vs. WOMBOUGH.

Contracts are to be construed and adjudged by the laws of the place where they are made, except when they are to be performed in another state or country. In such cases their validity is to be decided by the laws of the place of performance.

Yet cases involving the rate of interest, where it is stipulated in the contract at the place where the loan is made, in conformity with the law of that place, at a higher rate than is permitted by the law of the place of payment, are not within the exception, but the specified rate of interest at the place of contracting will be allowed.

Promissory notes, made and dated in Minnesota, for money there loaned and advanced, payable at a bank in the state of New York, with interest at 26½ per cent per annum, and secured by mortgage on land in Minnesota will not be declared void, by the courts of this state, or be directed to be surrendered and canceled.

THE plaintiff brings this action to compel the surrender of three certain promissory notes described in the complaint, and also demands that the notes may be declared usurious by the court. The plaintiff seeks to compel the defendant to deliver the notes either under the statute as void, or if the court shall consider them valid, then that the defendant shall be ordered to surrender the same on payment of the principal, inasmuch as the defendant wrongfully withdrew them from their place of payment, for the purpose of defeating the payment thereof. The defendant, in October, 1856, loaned the plaintiff \$5000 in St. Paul, Minnesota; \$1500 of which was in specie, and \$3500 in orders on New York. The plaintiff gave the defendant his promissory note for \$5000, payable at the Bank of Addison in this state, where the defendant has always resided, and still resides. The note by its terms provides that the plaintiff shall pay interest at the rate of 26½ per cent per annum, with a further stipulation that in case the note is not paid at its maturity, then the principal and interest then accrued thereon shall draw interest at the rate of 60 per cent per annum. The other two notes were given in part payment of the interest as it accrued, with \$484 and a note of one Sprague for \$500,

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secured by a mortgage. Also, the two lesser notes have the same place for payment, draw interest at 36 per cent per annum, and also provide that in case they are not paid at maturity, then principal and interest draw five per cent per month during the time they remain unpaid. It was also in evidence that there were mortgages on lands in Minnesota given as collateral security for the payment of these notes. The interest was paid semi-annually, as above, at Addison, N. Y. When the notes fell due, the plaintiff tendered payment to the defendant by offering to the Bank of Addison, in New York, where the defendant resided, the full amount thereof, principal and interest, in gold. The defendant had withdrawn them from the bank, so that payment could not be made. The defendant, by his own act, defeated the payment of the notes, and thereby caused the contingent condition to attach, whereby the notes, by their own terms, were to draw interest at the rate of sixty per cent per annum on principal and interest, which it was insisted was a new and distinct contract, created by the act of the defendant in New York, and to be executed here.

The action was referred to a referee. On the trial it was admitted by the respective parties as evidence, that by the laws of Minnesota, as they were at the time of the loan in question, and still are, it was lawful to receive, or to agree to receive, any rate of interest agreed upon by the parties, and an agreement for any particular rate of interest could be enforced under the laws of said state of Minnesota.

The referee reported the following conclusions of law: *First.* That under the facts of this case, the law of the place where the contract was made must govern, and the notes are not, therefore, void. *Second.* That the fact of the offer to pay the notes when and where they became due, does not create any new contract, which makes the notes void for usury. *Third.* That the defendant was entitled to a judgment for his costs.

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The plaintiff appealed from the judgment entered upon the report.

Titus B. Eldridge, for the appellant. I. The transaction was a contract made in the state of Minnesota, to be executed in New York, and the validity of the contract, according to the decisions, depends upon the law of the place where the contract is to be executed. (*Robinson v. Bland*, 2 Burr. 1077. 31 *English Law and Eq.* 443. *Andrews v. Pond*, 13 *Peters' U. S. Rep.* 65, 67, 78. *Fanning v. Consequa*, 17 *John.* 518. *Boyle & Henry v. Edwards*, 4 *Peters' U. S. Rep.* 111, 125. *Campbell v. Hines*, 6 *Dow*, 116.) (1.) The reason of this is apparent. If a contract was legal or illegal merely with reference to the place where it was made, no state could have control of its laws and would have to administer every law but its own, and Delaware or Maryland lottery contracts would be valid here if the contracts regulating the same were only made in those states. (2.) The defendant claims that there is a different rule operating in cases of contracts on loans, from that governing other contracts. The cases show no such distinction, and there is no reason sufficient for such a distinction. (3.) The rule is not to refer to the *lex loci*, except for the purpose of construction, getting at the intention of the contracting parties where the contract is to be executed in a foreign jurisdiction; and this is only done from the influence of an ancient rule, that the parties as far as the law of construction and the formal requisites of the instrument were concerned, may be presumed from the nature of things as having the customs of place and *lex loci* in view at the time of contracting, from contiguity. (4.) So the ancient common and civil law agreed that where a contract was made in a place where the law allowed an arrest, and was payable or executory in a place where the law did not authorize an arrest, no arrest can issue in such a case. (*Perkins*, 1666.)

II. The only question in the case is whether the *lex fori*

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should govern in this action, and whether the *lex fori* should be, to use the phrase of commentators, the *lex solutionis*; whether the law of this jurisdiction is that which should refer to and effect this contract of loan. Undoubtedly the state of New York has the right to make laws for its citizens and rules for its courts. The defendant resided in the state of New York at the time the contract was made, when it expired, and at the present time. The contract, by its terms, was to be executed in the state of New York. The notes were owned and held here; every incident connected with the execution or duration of the contract was in New York. The defendant claims exemption from New York law, from the simple fact that the contract was made in Minnesota, and relies upon the following cases to support his view of the case: (6 *Paige*, 630. 7 *id.* 216. 4 *Denio*, 309. 4 *Sandf.* 276. *Story's C. L.* §§ 365, 428, 436. 23 *Barb.* 79. *Andrews v. Herriot*, 4 *Cowen.* 508.) (1.) There is not one of the above references in point, or which goes to sustain any such proposition. They do support the theory, however, of a certain rule adopted in cases of real estate, called *lex rei sitæ*. The principle generally described by that term has been too long settled to be disputed; but that rule cannot govern this case. The fact that there were mortgages given as collateral security for the payment of these notes does not restore the notes to validity, for collaterals cannot affect the original inception of a contract of loan, because they are mere dependent incidents, and subsequent in their nature. (8 *Cowen*, 669. 15 *John.* 162.) (2.) Suppose there had been mortgages as collateral given for the payment of these notes on property in New York, Massachusetts, Indiana and Vermont, there would have been six different laws governing this contract; according to the defendant's theory, some would have partially annulled it, and New York and Vermont pronounced it void. The notes here are the principal debt, and the collaterals are mere supplementary accessions and distinct contracts merely of suretiship.

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(3.) The question involved in this case was decided in the case of *Dewar v. Spark*, (3 T. R. 425.) The same question was raised in *Van Schaick v. Edwards*, (2 John. Cases, 355.) The judges were, however, equally divided in opinion, and the case was decided on another ground. The chancellor says, in *Hosford v. Nichols*, (1 Paige, 225,) that the question has never been settled in this state, but quotes the case of *Dewar v. Spark* in terms of approbation. So the court of errors decided, that where the parties entered into a contract in one country to be performed in another country, the amount of interest was to be ascertained with reference to the place where the contract was to be executed and not where the same was made. (*Fanning v. Consequa*, 17 John. 518. *Story's Confl. Laws*, § 296.)

Justice Story, in commenting on the decision in the case of *Chapman v. Robertson*, (6 Paige, 627,) says the decision was correct, but that the reasons set forth by the chancellor are not reconcilable with the cases. It will be noticed that no place of payment is mentioned in either the bond or mortgage in that case, and the presumption would in that case be that the money was payable at the domicile of the debtor, because there is where the default is made. (*Fanning v. Consequa*, *supra*, reversing S. C. in 3 John. Ch. R. 587.)

III. The defendant, by his act of withdrawing the notes from their place of payment and defeating the ability to pay them, caused the stipulation to take effect that the notes should bear interest at the rate of five per cent per month or sixty per cent per annum. This withdrawal was certainly done in this state, and by the defendant's own act. The result of this was an accomplishment or completion of one of the stipulations which must have the same force of a negotiation contract in this state, whereby the right, according to the terms of the contract, was given to receive the enormous interest of 60 per cent per annum. (1.) It can be no more lawful for a man to do an act in this state which will allow him to reserve to himself 60 per cent per annum

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on a contract, than to negotiate and contract for such a reservation. (2.) There can be no doubt of the usurious nature of these notes, from the fact that they allow the commission or omission of an act in this state which completes or sets running another contract in this state of the nature of the one in suit. The act of not paying in New York, on the day of maturity of these notes, secured to the defendant an interest on the principal of 60 per cent per annum, and also 60 per cent per annum on the unpaid interest; and that interest which was to draw such enormous interest, had accrued in the state of New York. It is very plain, from the cases and policy of our law, that no such contract is valid.

J. C. Van Loon and *F. C. Dininny*, for the respondent.

I. The notes and mortgages were made and delivered in the state of Minnesota for a loan of money, made there also. In such a case the *lex loci contractus* must govern in reference to construction and validity. (*Chapman v. Robertson*, 6 Paige, 627. *Pratt v. Adams*, 7 id. 632. *Depeau v. Humphreys*, 20 *Martin's La. Rep.* 1.)

There is no pretense that the notes and mortgages in this case were made out of the state to avoid the usury laws. The plaintiff resided at St. Paul, in Minnesota, and the defendant was there at the time, and the whole transaction took place there without any thought, as appears, of avoiding the usury laws, and the transaction is entirely covered by the decisions above cited. The case of *Pomeroy v. Ainsworth* (22 Barb. 118) is a still later case. In that case the contract was made in Vermont, and the court in deciding it cited the cases in the 6th and 7th Paige, and the Louisiana case, with approbation, and said that the laws of Vermont must govern in the construction and determining the validity of the contract, at least so far as usury is concerned. The case of *Davis v. Garr*, in the court of appeals, (2 Seld. 134,) bears directly upon this question. In that case the

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note was made at Apalachicola, in the state of Florida, and reserved interest at the rate of eight per cent. The defense was that the note was void for usury. The court held that the note and assumpsit of the defendant was at Apalachicola, in the state of Florida, and to defeat an action upon the note here, it was necessary for the defense to show that by the laws of Florida the note was illegal on account of usury or usury laws of that state. That the presumption in favor of the validity of the note under the laws of Florida must prevail, until the contrary be made to appear. The plaintiff in this case does not attempt to show that by the laws of Minnesota these notes or mortgages are invalid for usury; and in the absence of such proof, the presumption is in favor of the validity of such notes and mortgages under the laws by which they are to be judged. (*See 2 Seld. and 22 Barb. above cited. See also 2 Parsons on Cont. 95; Jacks v. Nichols, 5 Barb. 38.*) The proof shows, and the referee finds the fact, that the rate of interest reserved was legal by the laws of Minnesota. In the case under consideration, the notes were payable at the Addison bank; but the circumstances attending the making of them and the mortgages excludes the idea that they were made in reference to the laws of this state, and fully establish the fact that they were made with direct reference to the laws of Minnesota. The parties negotiated upon the subject of interest, and such amounts of interest were mentioned between them in the negotiation, and finally reserved by the notes and mortgages, as preclude the idea that they had any reference whatever to the laws of New York. Had no rate of interest been mentioned in the notes or mortgages, the court would be authorized, perhaps, to say that New York rates must govern. In that case, it might be said, the parties had in view the rate of interest where the notes were made payable; but in a case like the one under consideration, where the rate of interest reserved is such as would render the notes and mortgages void, if made in reference to the laws of this state, it would be doing violence to all rules

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of construction as well as the known and well settled rules of determining the validity of contracts, to hold that they were made with reference to the laws this state. Chancellor Kent says it may be laid down as the settled doctrine of public law, that personal contracts are to have the validity, interpretation and obligatory force in every other country, which they had in the country where they are made. The admission of this principle is requisite to the safe intercourse of the commercial world, and to the due preservation of public and personal confidence, and it is of very general reception among nations. Parties are presumed to contract in reference to the law of the country in which the contract is made. (2 *Kent's Com.* 457.) A contract valid by the law of the place where it is made is, generally speaking, valid every where, "*jure gentium*" and by tacit assent. The "*lex loci*" controls the nature, construction and validity of the contract, (*Id.* 454;) and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established. If the rule were otherwise, the citizens of one country could not safely contract or carry on commerce in the territories of another. The necessary intercourse of mankind requires that the acts of parties, valid where made, should be recognized in other countries, provided they be not contrary to good morals, or repugnant to the policy and positive institutions of the state. (See *Lodge v. Phelps*, 1 *John. Cas.* 140; *Van Schaick v. Edwards*, 2 *id.* 358; 2 *Atk.* 372.)

II. The *lex situs* should govern in this case. It is well settled by the laws of every state and country, that the transfer of real estate, or the creation of any lien or incumbrance thereon, must be made according to the *lex situs*, or the law of the place where the land is situate. (*Chapman v. Robertson*, 6 *Paige*, 630. *Hosford v. Nichols*, 1 *id.* 226. *Hawley v. James*, 7 *id.* 213. *Abell v. Dougla*, 4 *Denio*, 309. *Nicholson v. Leavitt*, 4 *Sandf.* 276. *Story's Con. L.* §§ 365, 428, 436. 2 *Bland's Ch. R.* 146.) See also *D'Ivernois v.*

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Leavitt, (23 Barb. 79,) in which the court say: "The rights relating to the acquisition, enjoyment and disposition of real property, are prescribed and regulated exclusively by the laws of the country in which the property is situated. Every community, independent and sovereign, possesses this power as an inherent and essential element of its sovereignty. No other community can interfere with the method by which real property may be acquired or lost, the tenure by which it may be held, the duration or quantity of interest in it, or the conditions to which the enjoyment of it is subject." (*See also Andrews v. Herriott*, 4 Cowen, 527, and the cases there cited.) It can avail the plaintiff nothing, that he waived any relief against the mortgages. By this course, it is insisted by the defendant, he waives his entire cause of action as set forth in the complaint. The evidence clearly shows that the defendant would not have loaned the money on the notes alone. He required real estate security, and it was given by the plaintiff. The notes and mortgages form but one entire agreement. The plaintiff admits, by waiving any relief that shall affect the mortgage, that this court has no power (which is very clear upon authority) to grant any such relief, but insists upon the relief prayed for so far as the notes are concerned. If I am right in my conclusion that the note and mortgage forms but one entire agreement, (*see 2 John. Cas.* 360, 361,) then it follows that no such relief in reference to the notes can be granted that will not of necessity affect the mortgage; for while they together form but one entire agreement, the notes are the principal and the mortgage the incident: the principal cannot be affected by any legal adjudication that will not in a corresponding manner affect the incident. The agreement cannot be parceled out so as to make one part subject to the laws of one state and the other part to the laws of another state. (*Van Schaick v. Edwards*, 2 John. Cas. 360, 361.)

III. This action cannot be maintained. The notes and mortgages were due at the time of the commencement of this

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action, and an action was pending in the courts of Minnesota to foreclose the mortgages. Such action is based upon the notes, which have the same relation to and connection with the mortgages that a bond would have; and any defense to the notes on the ground of usury can be made in that action, and should the defendant sell or assign them, they and each of them would be subject to any legal or equitable defense in such purchaser's hands, to which they would be subject in the hands of the defendant; hence the action is uncalled for. The plaintiff has a complete remedy, and a full opportunity of interposing his defense, which, if successful, would be quite as full a protection of his interest as the relief asked for in this action. The court in which the foreclosure was pending, was fully competent to determine the whole controversy between these parties, and that such court should be allowed to do so in this case seems to me to be eminently proper. The whole transaction was there; the property affected by the mortgages is there, and all the dealings between the parties have been with direct reference to the laws of that territory and state. It is a suspicious circumstance, at least, that the plaintiff comes from Minnesota, and seeks the aid of a court here, in a state foreign to the transaction, to restrain the defendant from pursuing his remedy for default of payment of mortgages, made in and affecting property in the state where such remedy is sought. That this court should not interfere in such case, see *Grant v. Quick*, (5 Sand. 612.) This court has not the power, and if it has, it should not exercise it to restrain proceedings previously commenced in the court of a sister state. (*Mead v. Merritt*, 2 Paige, 402. *Burgess v. Smith*, 2 Barb. Ch. 276. *Driggs v. Wolcott*, 4 Cranch, 179. *McKim v. Vorhees*, 7 id. 278.) These cases are all directly in point, and it is insisted that although this court may have the physical power to act coercively on the parties within its jurisdiction, it has frequently been decided, as will be seen by referring to the authorities, that it will not sustain an injunction bill to restrain a suit or proceedings

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previously commenced in a court of a sister state. This same principle has been adopted by the supreme court of the United States, as will be seen by reference to the cases in 4th and 7th of *Cranch* referred to; and it will be difficult to find a case wherein a court of equity in the union has deliberately decided that it will exercise the power of restraining proceedings which have been previously commenced in the courts of another state. Not only comity, but public policy, forbids the exercise of such a power. If this court should give a judgment restraining proceedings already or previously commenced in a sister state, the court of the state where such proceedings are pending might retaliate, and by process compel the plaintiff here and defendant there to relinquish his subsequently commenced action. By this course the courts of different states would be brought into collision with each other in regard to jurisdiction, and the rights of suitors would be lost sight of in a useless struggle for the ascendancy in jurisdiction.

By the Court, LEONARD, J. The statutes of this state direct that any evidence of debt taken or received in violation of the laws against usury, shall be declared void, and any prosecution thereon shall be enjoined, and the same shall be ordered to be surrendered and canceled. The judgment of this court must be so pronounced whenever the usury shall satisfactorily appear by the admission of the defendant, or by proof.

The promissory notes mentioned in the complaint are undoubtedly usurious, if they are to be judged by the laws of the state of New York.

They are made and dated in Minnesota, for money there loaned and advanced by the defendant to the plaintiff, payable at the Addison Bank, Steuben county, in the state of New York, two and three years after date, with interest at 26½ per centum per annum. The plaintiff, who was the borrower, resided in Minnesota, and the defendant in the state

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of New York, at the time of the loan. The notes are secured by mortgage on land in Minnesota. It should perhaps be added that the defendant had no intention to violate the laws of New York in making the loan. By the laws of Minnesota any rate of interest is allowed which may be agreed on by the parties.

The usual rule of law is that contracts are to be construed and adjudged by the laws of the place where they are made, except where they are to be performed in another state or country, and in such cases their validity is to be decided by the laws of the place of performance. (*Story's Conf. L.* §§ 242, 280. 2 *Kent's Com.* 459, *marg.*)

It appears, however, that cases involving the rate of interest, where it is stipulated in the contract at the place where the loan is made, in conformity with the law of the place, at a higher rate than is permitted by the law of the place where the payment is to be made, are not within the exception, but the specified rate of interest at the place of the contract has been allowed. (2 *Kent's Com.* 460, *marg.* 2 *Parsons on Cont.* 95. *Hosford v. Nichols*, 1 *Paige*, 220. *Depau v. Humphreys*, 20 *Martin's La. R.* 1. *Chapman v. Robertson*, 6 *Paige*, 627. *Pratt v. Adams*, 7 *id.* 632. *Pomeroy v. Ainsworth*, 22 *Barb.* 121. *Gibbs v. Fremont*, 20 *Eng. L. & E. Rep.* 555.)

I am aware that some of these cases have been criticised and doubted. (*Story's Conf. L.* § 293, *b. c. and note*, and §§ 298, 300, *and note* 1.)

Under these decisions the notes would be upheld in Minnesota. We cannot, without overruling the authorities of our own state, declare these notes to be void, or direct them to be surrendered and canceled.

I advise the affirmance of the judgment with costs.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham* Justices.]

In the matter of proving the last will &c. of NATHANIEL GILMAN, deceased.

A testator, and three other persons, M., H. and C., being together in the same room, the testator asked M. if he would witness his will, and if H. and C. would do so, also. M. answering that H. and C. had said they would, the testator produced and signed a paper, and declared it to be his will. M. then signed the attestation clause; after which, at the request of the testator, and in his hearing, he asked H. and C. to witness the will, in these words: "Mr. G. [the testator] requests you to witness his will;" the testator making no objection. The will was then signed by H. and C. as witnesses. *Held* that the will was well executed.

An instrument is signed at the *end* thereof when nothing intervenes between the instrument and the subscription. Accordingly *held* that a codicil was signed by the subscribing witnesses at the end thereof, although there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause.

The decree of a surrogate, admitting a will to probate, determines only the sufficiency of its execution. In respect to that question, the *domicil* of the testator is unimportant.

APPEALS by Winthrop W. Gilman and Anna K. Gilman from a decree of the surrogate of the city and county of New York, admitting to probate the will of Nathaniel Gilman, deceased, and the codicil thereto.

Nathaniel Gilman, the decedent, died December 19th, 1859. The paper admitted to probate as his will bears date April 10th, 1858, and was alleged to have been executed at the city of New York, in the presence of William Miles, Samuel Hurley and Alexander C. Collins, as attesting witnesses. The paper admitted to probate as a codicil to the will bears date the day of the decedent's death. Both the will and the codicil were drawn by Isaac Redington, one of the executors named in the will, and he was present at the execution of both of them. The attestation clause following the will, and that following the codicil, are both in the same words, viz: "Signed, sealed, published and declared by said Nathaniel Gilman to be his last will and testament, to which we have, by his request, and in his presence, and in the presence of each other, set our names, the day and year aforesaid." It

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was claimed that they were both imperfect in that they do not state that the subscription of the testator was made in the presence of the witnesses or acknowledged by him to them.

On behalf of the appellant it was claimed that the proofs showed the following facts as to the execution of the paper propounded as a will. The witnesses Miles, Hurley and Collins had all been acquainted with the decedent for many years. A day or two previous to the execution of the will, Miles testifies that the decedent sent to him to inquire if he would be at leisure on a day appointed, and whether Collins, Hurley and another person would unite with him as witnesses. Miles says that he arranged with Hurley and Collins that they should be present, and sent word to the decedent to that effect. On the day when the will was signed the decedent came to the place of business of Hurley and Miles in Gold street, accompanied by Mr. Redington. The offices occupied by Hurley and Miles consisted of two rooms, which were separated from each other by a brick partition or pier about four feet in width. In the first room entered from the street stood a writing table about seven feet long and three and a half wide. Directly opposite to that table was the pier or partition separating the two rooms. Beyond and opposite this, and in the back office, was a business desk, about ten feet in length, the ends of which extended beyond the pier on either side. A person standing at the desk, on the side nearest the table, would be from thirteen to fifteen feet distant from persons occupying the positions of Miles and Gilman at the table. The table could not be seen from the center of the desk, but could from either end. It did not appear that a person standing at the center of the desk, could see the table without stepping towards the opening at the side of the partition wall. When Mr. Gilman entered the office, he, Mr. Redington, and Mr. Miles seated themselves at the table. Hurley was standing at the desk on the side towards the partition with his back towards Gilman ;

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and Collins was at the other side of the desk and opposite to Hurley. While at the table, and before signing the will, the decedent asked Miles if he would witness the will, and if Hurley and Collins would do so also. Miles answered that he had spoken to them about it, and they said they would. Gilman then signed the paper and declared it to be his will. Miles then signed the attestation clause. Up to this time Hurley and Collins had remained in their respective positions at the desk, and neither of them had seen or heard any thing that had passed. At this time, according to the testimony of Hurley, Miles called Hurley by name. Hurley left the desk and went to the table. When he got to the table Miles said to him, "Mr. Gilman requests you to witness his will." Miles handed him the will, and Hurley, standing at the end of the table, signed his name to the attestation clause. Then Miles called Collins by name. Collins left the desk, and when he reached the table Miles said to him, also, "Mr. Gilman requests you to witness his will." Hurley, still standing at the end of the table, held the will open and Collins signed the attestation clause. As soon as this was done, Hurley and Collins returned to the desk. As they left the table, the decedent nodded his head in the usual manner of persons taking leave of each other. Hurley swears positively that he did not hear the decedent speak during the whole of the transactions in the office, except to ask for Mr. Miles when he first came in, and perhaps to say "good morning," at the same time. Nor did he see him make any sign or gesture except the nod already mentioned. Collins remembers but little of the transaction. Miles thinks that, after Hurley and Collins were called in, the decedent stated that he had made his will, and acknowledged the instrument to be his last will and testament, and asked Hurley and Collins to subscribe as witnesses. But he states this with many qualifications, and confesses that the facts have not always been fresh in his recollection, and that he has been obliged to make an effort to recall them. In

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other respects, his testimony corroborates that of Hurley. Mr. Redington was present before the surrogate, but was not examined.

The objection to the codicil was that it was not attested in compliance with the provisions of the statute of this state, regulating the execution of wills. The codicil was written on foolscap paper, fastened together in book form by a silk ribbon, passed through the center of the paper. The writing commences at the top of the right hand side of the book, when it is opened, at its center, and is continued to nearly the bottom of the page. The other side of the page thus written on is left blank, and the writing continued on the following right hand page, and ends four lines above the bottom of the page, where the testator signed the codicil. The three lines on the page below the signature of the testator are left blank, and also the page next succeeding, and seven lines of the third page. On the hearing before the surrogate certain of the heirs objected to the proof of the will, for the reason that the testator was not an inhabitant of this state, and did not die in this state, but was an inhabitant of the state of Maine, and died at Waterville, in the latter state, and that the will was taken from that state and brought here for probate, without the consent of the executrix, and the widow. And also for the further reason, that proceedings had been taken in the state of Maine before any proceedings were had before the surrogate of the city and county of New York, before a court having competent jurisdiction in the state of Maine, and letters testamentary granted. And they offered to show that the testator was a non-resident and a non-inhabitant of the state of New York, and was a resident and inhabitant of Waterville, in the state of Maine, at the time of his decease; and also that letters of administration had been granted on the estate before these proceedings were taken, and claimed the right to show it before any proceedings were taken. On objection this offer was refused, and exception taken.

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C. H. Glover, for the appellant Winthrop W. Gilman.

Wm. Tracy and *Wm. Curtis Noyes*, for the appellant Anna K. Gilman.

Wm. Fullerton, for the executors &c.

A. W. Bradford, for the minor respondents.

By the Court, LEONARD, J. 1. The will in question was well executed. The testator and the witnesses were all in the same room at the moment the attestation was signed. The witnesses all signed substantially in the presence of each other, as well as in the actual presence of the testator, within the meaning of the statute. So far as the witness Miles is concerned the will was actually signed in his presence. Miles, at the request of the testator and in his hearing, requested the two other witnesses, Hurley and Collins, then present in the same room, to witness the will, in these words: "Mr. Gilman requests you to witness his will." The instrument was then produced, already signed by the testator, and in his presence signed by Hurley and Collins, as witnesses. The testator had previously requested Miles to have these persons present to witness the execution of his will, and to be present himself. The testator understood the business which was then being transacted. He made no objection to the declaration or request made by Miles in his presence and hearing, but proceeded to consummate the business for which he came there, the execution and attestation of his will. The intent to execute his last will was thereby published and declared, and was also acknowledged by the testator, and the witnesses were by him requested to become attesting witnesses.

2. The codicil is also well executed. An instrument is signed at the end when nothing intervenes between the instrument and the subscription. Who shall undertake judicially to say that the subscription shall be one-eighth of an

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inch, half an inch, two inches or ten inches from the last line of the instrument? The distance from the last line has not been fixed by statute. The place named in the statute is the end. The end of an instrument, in writing, commences and continues until something else, or some other writing occurs.

These principles are, I think, in conformity with the spirit of the decisions in this state in respect to the execution of testamentary instruments.

3. The decree of the surrogate, admitting the will to probate, determines only the sufficiency of its execution. In respect to this question the domicil of the testator is unimportant in this case.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham*, Justices.]

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK vs. JOHN KERR and others.

The question whether the title to the streets was in the corporation of the city of New York, and whether the corporation could object, on constitutional grounds, to the laying down of a rail road track in the streets, by the grantees under the act of April 17, 1860, without compensation therefor being made to the corporation as owners of the fee, having necessarily been before the court in *The People et al. v. Kerr et al.*, (87 Barb. 357,) and the court there deciding that the legislature was clothed with the power of granting to the defendants the right to put down and operate a rail road in the streets of the city without paying any compensation for such new use of the soil of the streets, either to the corporation, or to the owners of lots fronting on the streets, the court will not entertain a similar action, brought by the corporation of the city, to restrain the laying down and operating of a rail road by the grantees, under said act, until the parties have invoked the judgment of the court of appeals upon the questions involved.

APPEAL from an order made at a special term, denying the plaintiffs' motion for an injunction, and dissolving the temporary injunction. The plaintiffs alleged in their

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complaint that they are an ancient corporation, and, under their charters, are possessed of divers property, liberties, privileges, royalties and franchises of great value; that among these are the streets, avenues and thoroughfares of the city, the right to the free, open and unobstructed use thereof, and the right and franchise of laying out and regulating the same; the office of licensing and of limiting (at discretion of these plaintiffs) the number of those who carry for hire within the said city, and of receiving and having to these plaintiffs, as their property, fees, rewards and profits for the licenses and permits so given; and that these plaintiffs have, from time immemorial, possessed and enjoyed, and under their charter have and own the exclusive right and property of controlling and licensing, for fee and reward, all those who use the said streets and thoroughfares for carrying thereupon persons and property for hire. That they have, at great expense, paved said streets and regulated the same and made them convenient for the passage and travel of the inhabitants of said city. That, in violation of the said rights, liberties, privileges and franchises, the defendants, on the first day of September, 1862, and on divers days and times between that day and the 6th day of October, 1862, broke and entered a certain close of the plaintiffs, commonly called the Seventh avenue, and also a certain other close of the plaintiffs called Broadway, both closes being public streets and highways, and from Fifty-ninth street in said city, along said avenue, southward, to Broadway, and from thence along said Broadway, in the same general direction, to Twenty-eighth street, in said city, broke and dug up the stone pavements which the plaintiffs had before that time laid and constructed in said Seventh avenue and Broadway, and dug up, took and carried away great quantities of stones, earth and gravel, before constituting parts of said Seventh avenue and Broadway, and dug and made great holes and pits in the earth, and laid and placed great heaps and quantities of earth, stones, timber, iron and other things in and upon the carriage way and sidewalks

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which the said plaintiffs had made and constructed in said avenue and said Broadway, and laid down and placed in said avenue and Broadway great quantities of stones, timber, iron and other things, and by the means aforesaid greatly obstructed and injured said avenue and Broadway, and not only hindered, delayed and otherwise greatly injured the plaintiffs in the pursuit of their lawful affairs and business, and injured and destroyed the property of the plaintiffs, but divers good and worthy citizens, whose right to the free, open and unobstructed use and enjoyment of the streets, avenues and public thoroughfares of the city the plaintiffs were and are bound to protect and defend, were also greatly hindered, delayed and injured in the pursuit of their lawful affairs and business. That thereupon, and on or about the seventh day of October aforesaid, the plaintiffs did commence an action in this court against the said defendants, to recover damages against the said defendants to the amount of one hundred thousand dollars for the injuries sustained, as aforesaid, by them, by reason of the said unlawful acts of the defendants.

That, notwithstanding the premises, the defendants have not desisted nor refrained from their unlawful acts and proceedings, nor have they respected the rights of the plaintiffs, but they have continued to dig up, to take and carry away great quantities of stones, earth and gravel, before constituting parts of Broadway from Twenty-eighth street southward to Twentieth street, and to dig and make great holes and pits in the said streets, and thereby to obstruct and create a nuisance in Broadway aforesaid, and also by stones, timber and iron rails laid therein; and that the defendants also give out and threaten that they will, by themselves and their agents, continue in their said unlawful work, and that they will continue to dig into and lay down stones, timber and iron rails, and to injure the pavements and property of the plaintiffs in the said Seventh avenue, Broadway and University place, and in very many other streets in said city; and they further give out and threaten that they, disregarding the franchises,

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offices and rights of the plaintiffs, will place and run vehicles or cars upon the said rails so laid, and will carry persons and property therein and thereupon for hire, and will, as carriers, use the said streets without obtaining license from the plaintiffs, and without paying the plaintiffs for the privilege of so doing, and to the irreparable injury of the plaintiffs. Wherefore the plaintiffs demanded the judgment of the court, that the defendants, their agents and servants, and all persons acting by or under their authority, be perpetually restrained from digging into or otherwise interfering or meddling with any of the streets of the said city, and from placing stones, timber and rails in the said streets, and from running cars or other vehicles thereon for hire; and that, during the pendency of this action, they be likewise restrained; and for other relief, &c.

Upon this complaint and an affidavit annexed, an order to show cause why an injunction should not issue was granted, returnable on the 3d Monday of October, 1862, and for a temporary injunction in the mean time. On the return day, an affidavit of the defendant Kerr was read, in opposition to the motion, in which he stated that he was one of the persons engaged in laying and constructing the railroad referred to in the complaint. That the persons so engaged are some of them the original grantees named in the act entitled "An act to authorize the construction of a rail road in Seventh avenue, and in certain other streets and avenues of the city of New York," passed April 17, 1860, and others the assignees of several of the original grantees, and the acts so done by them had been done and transacted under and by virtue of the grant and license contained in said act. That in laying the said rail road so far as they had progressed therewith, they had constructed the same upon the most approved plan for the construction of city rail roads, and had been careful to create no annoyance or inconvenience to the public use of said streets and avenues, except such as was necessary for that purpose; and as they had progressed and laid said rail

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road they had restored the pavement necessarily disturbed and removed in the course of such construction, and made it better in many places than it was before. That the defendant had not, nor had any other of said grantees or of said associates, as the deponent was informed and believed, any intention of running vehicles or cars upon said rail road, or on the rails so laid, or as carriers to use said streets, without paying the plaintiffs the license fee annually for each car run thereon, as required in and by the said act authorizing the construction of said rail road. That the deponent and his said associates had caused the title of the mayor, aldermen and commonalty of the city of New York, in and to the parts of the several streets and avenues mentioned in the complaint, and in and through which said rail road has been partly built, to be investigated, and that neither at the time of the passage of the said act, nor at any time since have the plaintiffs had, held or possessed any title or interest in said streets or avenues, except such as have been conferred upon them under proceedings had or taken under the provisions of the act entitled "An act to reduce several laws relating particularly to the city of New York into one act," passed April 9, 1813, and the several acts in addition to, and amendatory thereof, and that their title and interest in said streets and avenues has been and is upon trust that the same be appropriated and kept open for, or as part of, a public street or avenue forever, in like manner as the other public streets and avenues in the said city are, and of right ought to be, as presented by the 178th section of said act. That the plaintiffs do not possess under their charter, or otherwise, exclusive of legislative interference and control, any right to the free and unobstructed use of the streets and avenues of said city or of laying out or regulating the same, or of licensing at discretion the number of persons who carry passengers for hire in said city, or of receiving to their own use, or as their property, the fees, rewards, or profits of licenses given therefor, nor any exclusive right or property, independent of the aforesaid legislative in-

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terference and control, of controlling and licensing those who use the streets or thoroughfares of said city, for carrying thereupon persons for hire, nor have the plaintiffs any private right or property in, or control over said streets and avenues, or in the use thereof, which is not subject to the control and disposition of the legislature, to the extent and in the manner they have by the aforesaid act, authorizing the construction of said rail road, assumed to control and dispose thereof.

The court made an order denying the motion for an injunction, and dissolving the temporary injunction, with costs.

Greene C. Bronson and *Edwards Pierrepont*, for the appellants.

H. W. Robinson, for the respondents.

By the Court, LEONARD, J. Could any substantial difference be perceived between the present case and that of *The People ex rel. The Trustees of the Sailors' Snug Harbor and others v. John Kerr and others*, decided by this court at general term in July last, it might be profitable to give my own views upon the merits of this controversy.

The question was necessarily before the general term in that case whether the title to the streets was in the corporation of the city of New York, and whether the corporation could object, on constitutional grounds, to the laying down a rail road track in the streets of the city by these defendants without compensation therefor being paid to the corporation as owners of the fee, under the authority of an act of the legislature.

That decision, although upholding the title of the city of New York to the streets in fee simple in trust for the use of the public as highways, expressly decided that the legislature were clothed with the power of granting to the defendants the right to put down and operate a rail road in the streets of the city without paying any compensation for such

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new use of the soil of the streets, either to the corporation of the city of New York, or to the owners of lots fronting on the streets.

We think it unprofitable that any further conflict of authority should occur upon this question in courts of the same jurisdiction, and that the parties interested should, if they think proper, invoke the judgment of the court of last resort upon these questions, which have so long occupied the attention of different judges of this court, and have called forth such a diversity of opinions.

The order appealed from should therefore be affirmed, with \$10 costs of the appeal to abide the event.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham, Justices.*]

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Upon a sale of molasses, made at Havana, by P. to U. P. & Co. the purchasers agreed to pay the price, on delivery. Subsequently, after U. P. & Co. had become embarrassed, and at a time when their bankruptcy was imminent, they obtained the delivery of the molasses on board their vessel, and procured a bill of lading thereof. Having failed, without the knowledge of P., they caused the vessel so laden with the property, to depart for New York, consigned to M. T. & Co., without paying for the molasses, and upon payment being demanded, they refused it, for want of ability. *Held* that there was sufficient evidence of the fraudulent intention of U. P. & Co. to obtain the delivery of the property without payment of the price, to require that question to be submitted to the jury, in an action by P. against a subsequent purchaser, to recover the value of the goods.

Held, also, that if the intent of the purchasers was fraudulent (which it was for the jury to determine) then the production at the trial of a note given by them at the time of the sale, for a part of the price, and an offer to surrender it, was in season; even if it should be found that the sale was partly upon credit. And this, although the note might have been, at some period, out of the hands of the plaintiff; provided the possession and exclusive interest was in him at the time of the trial.

This is the rule where the note is that of the fraudulent vendee, and not the note of a third party.

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Held, further, that the right of stoppage *in transitu* was not in the case; the delivery of the property by the vendor on board the vessel of the purchasers having placed the same entirely in their dominion, and the property having reached its destination, as between the vendor and vendee. And the molasses was not *in transitu*, as between them, on its passage from Cuba to New York.

Also held, that if the note given by the purchasers was purely an accommodation note, and not an advance upon the security of the molasses when delivered; or if the purchasers, at the time the vendor made his demand for payment, waived a return of the note; the jury would have been justified in finding for the plaintiff as upon a conditional sale. But if the note was an advance upon such terms as to entitle the purchasers to claim the right to appropriate so much of the price of the molasses as would be sufficient to meet the note, and there was no subsequent waiver of that right, then the sale was not conditional. That the delivery must be considered conditional as to the whole of the property, or as to none.

THIS action was brought by the plaintiff, a resident of Cuba, against the defendants, to recover the value of a cargo of 49,222 gallons of molasses, shipped from thence early in July, 1859, and without the plaintiff's authority, consigned by the firm of Ulrici, Playle & Co., of that island, to Moses Taylor & Co., of the city of New York. The answers of the defendants deny that the molasses was, when shipped, the property of the plaintiff, but aver that the same belonged to the firm of Ulrici, Playle & Co., and the defendants also, in substance, allege, that upon the arrival of the property here, the same was seized under attachments issued at the suit of creditors of that firm, and sold to satisfy their demands. Upon the trial it was proven and conceded, that the plaintiff was owner of the molasses until the same was laden on board the *Union State*; and the real question was, whether the firm of Ulrici, Playle & Co. then, as against the plaintiff, became owners as purchasers from him. If they did, the plaintiff would not be entitled to recover. If they did not, he must prevail, inasmuch as it was not pretended that either of the defendants had purchased or made advances upon the property. The circumstances under which the molasses was delivered on board the *Union State*, were substan-

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tially as follows : On the 28th of February, 1859, the plaintiff, at Havana, agreed to sell to the firm of Ulrici, Playle & Co. 100,000 gallons of molasses, and by another agreement of May 6th, 1859, 50,000 gallons more. The first named quantity of about 100,000 gallons was delivered in two cargoes, on board the *Grampus* and *Crocus*; the cargo by the latter not having been shipped until after the making of the agreement of May 6th. The lading of the cargo of the *Union State* commenced June 20th, and was finished on the 30th of June, or the 1st or 2d of July. The cargo was delivered at Carahatas, which is about 200 miles from Havana, the ordinary time for mail communication between the two places being from three to five days. The *Union State* lay, at the time she received the cargo, in Sagua La Grande bay, Sagua La Grande being about twenty miles from Carahatas. There is a telegraphic communication between the former place and Havana, but none from thence to Carahatas. The molasses was conveyed from the warehouses of the plaintiff to the *Union State* in lighters, and as each load was delivered, the captain, Foxwell, gave receipts therefor. It was customary for captains to give such receipts, and this was known to the firm of Ulrici, Playle & Co. And that these were given was also known to them. These receipts, as stated by Foxwell, the defendants' witness, were given that the holder thereof might be entitled, on their presentation, to receive bills of lading for the cargo. The usage of the island, as proven by two witnesses, and not denied, is, that the holder of such receipts retains his property in and control over the cargo embraced in them until they are surrendered. And Ulrici states that the plaintiff's consent was necessary for shipping the molasses as well as for dispatching the vessel. Before the cargo was laden on board, and as early as June 25th, the firm of Ulrici, Playle & Co. knew they were insolvent and must fail. Playle says the firm failed in June. Barroso and Pequeno state the failure to have been on the 2d of July. Ulrici swears it suspended July 4th, but he de-

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clined to state whether the members of the house had resolved to stop before the Union State sailed, or to give any information as to the pecuniary condition of the firm. Miguel Newhall was employed by Ulrici, Playle & Co. to receive for them and gauge the molasses as it was sent on board. And when the cargo was complete he gave to the plaintiff's agent a receipt, stating the quantity delivered, intended as a voucher to enable the seller to demand and collect the price. No member of the firm of Ulrici, Playle & Co. was in Carahatas when the molasses was shipped. Their place of business was Havana, and there also was the plaintiff's counting house. It was, therefore, impossible for the plaintiff to demand the money for the cargo the instant it was delivered on board; but such demand was made so soon as the vouchers and bill could be transmitted to him in Havana. And upon demand made, the reply was that it could not be met, because the house had suspended payment. Thereupon a telegram was immediately dispatched by the plaintiff to his agent at Carahatas to stop the Union State and take possession of the molasses; but this was received about sixty hours after she had sailed. The time of sailing is stated by L. Pequeno to have been the 3d of July; but Foxwell, the master, states it was on the 5th, about 6 or 7 o'clock in the morning. Several days before the cargo was laden on board the Union State, the firm of Ulrici, Playle & Co. knew they were insolvent and must soon suspend; and as by the law of Cuba the insolvent cannot, after he becomes such, acquire title to property purchased, this fact was concealed from the plaintiff until the vessel could be hurried off. The departure of the vessel was, as to the plaintiff and his agent, kept secret. No application was ever made to either for the captain's receipts for cargo, nor for permission to sign bills of lading, nor for leave to dispatch the ship; and these receipts were retained by the plaintiff until they were produced as evidence in this cause. Bills of lading were, however, signed by the captain, and delivered to the agents of Ulrici, Playle &

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Co. as soon as the cargo was laden on board, and these had been made out in Havana by that firm, and sent by or delivered to Newhall, who procured the captain's signature thereto, on the 4th of July; although the bills were dated the 2d. Before the molasses reached New York notice was given to the defendants of the plaintiff's rights and claims, but these were disregarded, and the property afterwards sold by them. On the foregoing facts, the court dismissed the complaint.

The plaintiff insisted that the court erred in not directing a verdict in his favor. (1.) Because, as holder of the captain's receipts, he retained the absolute control over and right to the possession of the molasses, until he should be paid therefor. (2.) Because, as the same, or at least a part thereof, was sold for cash, the title thereto did not vest in Ulrici, Playle & Co. until payment of the price, the right to insist upon which as a condition precedent, the plaintiff did not waive. (3.) Because, by the law of Cuba, under which the rights of the parties are to be determined, the plaintiff, upon the insolvency of Ulrici, Playle & Co., had a right to reclaim the molasses, whether the same was sold for cash or upon credit. (4.) Because, on the facts as proven, the plaintiff had a right, which he exercised, to stop the property *in transitu*. (5.) And at all events, even had the court been adverse to the plaintiff upon these grounds, it was bound to have submitted to the jury the questions whether or not the delivery of the molasses to Ulrici, Playle & Co. was conditional or unconditional; and whether or not they obtained possession of the same fraudulently.

The cause came before the court upon exceptions taken by the plaintiff to the decision of the judge, upon the trial, dismissing the complaint, and which were directed to be heard in the first instance at the general term.

E. W. Stoughton and *F. H. Dykers*, for the plaintiff.
I. The plaintiff, by virtue of the usage of Cuba, and of the law merchant, by receiving and holding the captain's receipts

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for the cargo in question, retained the control over and right to the possession of the same; and the firm of Ulrici, Playle & Co. in obtaining possession of the molasses without the plaintiff's consent, did so wrongfully, and neither they nor their creditors are entitled to hold the same. (*Ruck v. Hatfield*, 5 *Barn. & Ald.* 632. *Craven v. Ryder*, 6 *Taunt.* 433. *Brower v. Peabody*, 3 *Kernan*, 121. *Abbott on Shipping*, *marg. p.* 321. *Jones v. Bradner*, 10 *Barb.* 193. *Blossom v. Champion*, 37 *id.* 554.)

II. The molasses in question, or at least a part thereof, was sold for cash, payable on delivery. Payment of the price or waiver thereof, was, therefore, a condition precedent to the vesting of title in the firm of Ulrici, Playle & Co. Hence, independent of the said receipts, the plaintiff having demanded the price as soon as he could after delivery on board, and having taken immediate steps to assert his right to the possession of the property, is now entitled to recover the same, as against that firm, and all others claiming as their creditors. Whether the delivery is absolute or unconditional, and whether payment of the price as a condition to the vesting of title has or has not been waived, depends upon the conduct and intent of the parties at the time. It is not necessary for the seller to declare, when delivery is made, that he does so on condition of receiving payment; for such delivery will be conditional, if the intent of the parties that it should be so can be inferred from their acts and the circumstances of the case, and whether the delivery was conditional, or whether the condition has been waived is for the jury. (*Morris v. Rexford*, 18 *N. Y. Rep.* 552. *Smith v. Lynes*, 1 *Seld.* 41.) 1. The cargo was sold wholly or in part for cash, and it is not very material to consider which branch of this proposition be correct, for if part only was payable on delivery, the same principles of law would apply as to delivery, waiver, &c., as though payment of the entire sum was to be made. That the entire cargo was to be paid for in cash on delivery seems, however, to be clear from the follow-

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ing considerations : 1. The molasses was sold at the current price of Cardenas on the day it should begin to be received. The evidence is uncontradicted that sales of molasses, in Cuba, were always for cash. The current rates mentioned in the contract were, therefore, necessarily to be cash rates. (2.) It is not stated in the contract that the note for \$7277.50 was to be received in part payment of the molasses, and therefore the contract is consistent with the proof, that it was given for the accommodation of the plaintiff ; and Ulrici admits that it was not given upon the request or for the accommodation of his firm. (3.) The cash, says Ulrici, was to be paid in Havana ; and that the note was not by his firm treated as part payment, is evident from his testimony that when his firm failed they owed the plaintiff \$10,918.35, and is also shown by the approval as cash by Ulrici, Playle & Co., of the bills for the entire cargo. If, however, it can, upon the contract and facts proven, be held that the note operated as a payment or extension of credit, as to that part of the price which its amount covered, then very clearly as to the balance, amounting to nearly \$4000, payment was to be made in cash on delivery ; for there was certainly no understanding, express or implied, that payment of this was to be postponed ; and as the presumption is that all sales made are for cash, he who would overcome this must establish the contrary by affirmative proof. (*Tipton v. Feitner*, 20 N. Y. Rep. 425. 1 *Parsons on Cont. marg.* p. 463.) 2. Not only was the sale for cash, but the plaintiff did not by delivering the molasses on board the vessel, waive his right to insist upon payment of the price, as a condition precedent to the vesting of title and right to possession in the buyers. Demand of payment could not be made until the property was placed on board, and then it could be done only by sending the bills and vouchers to Havana, where the firm resided. This was done with all possible despatch, and when payment was refused, an effort was made by the plaintiff at the earliest moment possible to reclaim the possession of the goods.

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If, however, upon the proof, any doubt could have been entertained upon this point, the question of conditional delivery, or waiver, or both, should have been submitted to the jury, in conformity with the rule laid down in the cases above cited.

III. By the law of Cuba, as proven, the fact that the firm of Ulrici, Playle & Co. were insolvent at the time the molasses was laden, entitled the plaintiff to reclaim the same, whether sold for cash or upon credit. By virtue of that law, the plaintiff had a lien upon and could exercise dominion over the property, so long as it remained in the condition in which this did on board the vessel.

IV. Under the circumstances of this case the plaintiff, even if we assume the molasses to have been sold on credit, would have been entitled to stop the same *in transitu*, and this right he sufficiently exercised. (1 *Parsons on Mar. Law*, 342, &c. *Harris v. Hart*, 6 *Duer*, 606.)

V. There was abundant evidence from which to infer that the property was obtained with the fraudulent intent not to pay therefor; and this question should have been submitted to the jury.

J. Larocque, S. Merrihew and A. J. Vanderpoel, for the defendants. I. The contracts and receipts for the molasses make a clear case of absolute and unconditional delivery by the plaintiff to Ulrici, Playle & Co. 1. No payment whatever, either in cash or note, was to be made by the purchasers as a condition of the delivery; on the contrary, notes for the approximate amount had been given in advance, and the small balance, if any there might be, was to be settled "at the exhibition of the account." 2. Even if there had existed the right to insist on payment, as a condition of delivery, it would have been clearly waived by the acceptance of Newhall's receipt for the molasses, on account of the purchasers, and without any condition or reservation whatever. (*Smith v. Lynes*, 1 *Seld.* 41, and cases cited.)

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3. Under these circumstances, the retention by the plaintiff of the captain's receipts, and of his own agent's certificates of the delivery, so much relied on, becomes utterly insignificant and immaterial. (1.) The contracts and the established practice between the parties in the cases of the two previous vessels, fully proved and undisputed, entitled Ulrici, Playle & Co. to the bills of lading at Carahatas, on the completion of the loading of the vessels, without waiting for the receipts to go to Havana, for payment to be made there, and advice of it to be returned to Carahatas. (2.) The usage attempted to be proved, therefore, had nothing to do with the case. The parties had made their own stipulations and established their own practice; and such a usage, involving a detention of eight or ten days of a vessel loaded and ready for sea, would be unreasonable and absurd, and is not pretended by any witness. (3.) Conceding for the sake of the argument, that the possession of the receipts might have entitled the plaintiff to make some reclamation against the vessel, if the bills of lading had been improperly delivered to Ulrici, Playle & Co., it could have no other effect, and the evidence of a full, unqualified delivery to the latter, already noticed, would be a perfect answer even to that claim. It will scarcely be pretended that a shipper cannot part with his title to the property shipped, *otherwise than by transferring the shipping receipts*. 4. Testing the case by the law of Cuba, the 9th subdivision of section 1114 of the Spanish code fully covers the case, even in favor of the syndics under the foreign bankrupt law, and supposing the property to have remained in Cuba. Nothing is better settled, however, than that foreign bankrupt laws and proceedings do not affect rights of property in this country, in cases like the present. (*Abraham v. Plestoro*, 3 *Wend.* 538.)

II. There neither existed a right of stoppage *in transitu* in favor of the plaintiff in this case, nor was any such right attempted to be exercised by him, before he brought suit, as was necessary to render it now availing. 1. This was the

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case of the delivery of the property to the agent of the purchaser, at a port not the place of residence of the purchaser, on board a vessel chartered by the latter, for transportation not to him, but to a foreign port, on a new consignment on his account, which forms an express exception to the right of stoppage *in transitu* by the mercantile law. (*Stevens v. Wheeler*, 27 Barb. 658, *per Ingraham, J. Harris v. Hart*, 6 Duer, 616. *Bohtlingk v. Inglis*, 3 East, 381. *Fowler v. McTaggart*, cited, with approval, in the two preceding cases. *Inglis v. Usherwood*, 1 East, 521. *Hodgson v. Lay*, 7 T. R. 442. *Valpy v. Gibson*, 4 Man., Gr. & Scott, 837.) 2. The right of stoppage *in transitu* is a right not in disaffirmance of the contract, but in affirmance of it, and for security of the payment of the contract price; the vendor exercising the right being entitled, after application of the proceeds of the goods towards payment, to sue the vendee, and recover the deficiency. Here, on the contrary, the plaintiff expressly repudiated the contract by his notices, both to Moses Taylor & Co. and to the sheriff. (2 *Kent's Com.* 540-542, *marg. paging. Mottram v. Heyer*, 5 Denio, 636.)

III. Even if the plaintiff had been entitled to rescind the contract, and to reclaim the goods on the failure of Ulrici, Playle & Co. to pay for them, (as already attempted to be shown that he had not,) he could not, in any event, do so without tendering back the note for \$7277.50, before the commencement of this action; that note having been procured to be discounted by him, and not having matured when the action was commenced. (*The Matteawan Co. v. Bentley*, 13 Barb. 641. *Wheaton v. Baker*, 14 *id.* 594. *Baker v. Robbins*, 2 Denio, 136. *Hogan v. Weyer*, 5 Hill, 389.)

IV. If an offer to return it on the trial would have been sufficient, (which is denied,) no such offer, which can avail the plaintiff, was made. An offer was made to return a paper which the plaintiff alleged to be the note in question, but the identity of which was disputed by the defendants, and no proof of it offered by the plaintiff.

V. There was no evidence to carry the cause to the jury upon the question of fraud, by Ulrici, Playle & Co., in making the purchase. (*Brown v. Montgomery*, 20 N. Y. Rep. 287. *Nichols v. Pinner*, 18 id. 295.) 1. There was no evidence of their insolvency when the purchase was made. 2. There was no evidence of any representations made by them. 3. There was no evidence of any fraudulent practice or contrivance to obtain possession after the purchase, or even that they were insolvent when they obtained possession.

VI. The several rulings of the learned judge upon the trial, on questions of evidence, which were excepted to by the counsel for the plaintiff, were correct.

By the Court, LEONARD, J. The question of first moment in this case is whether there was sufficient evidence of fraudulent intent on the part of the purchasers of the molasses to require the judge at the trial to submit that question to the jury.

The molasses was delivered after the purchasers had become embarrassed, and at a time when their bankruptcy was imminent; the vessel chartered by the purchasers to receive and convey the plaintiff's molasses, was dispatched from her port in Cuba laden with 50,000 gallons; the bill of lading for this cargo furnished by the plaintiff was obtained and forwarded by the purchasers to New York after their failure and insolvency had become publicly known at Havana, where they resided; and all this occurred while the plaintiff was ignorant of any change in their pecuniary affairs.

The price of the molasses was by the agreement of the parties payable on delivery; but the purchasers having obtained the delivery on board their vessel, and having obtained a bill of lading, caused the vessel, so laden, to depart for her port of destination after their public failure at Havana, without making payment for the molasses, and upon payment being demanded refused it, for want of ability or on account of their insolvency.

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There can be little doubt that the purchasers knew, when the molasses was being delivered, when they obtained the bill of lading and when the vessel sailed, that the price would not be paid on delivery, and that they knowingly deprived the plaintiff of the power to assert his title, and resume the possession of his property. Their intention to refuse payment after the delivery had been completed was during all this time at least probable.

It is said that the plaintiff had changed the terms of the contract of sale by receiving the note of the purchasers for \$7277.50, an estimated approximation to the value of the molasses to be delivered under the contract of May 6, 1859, and of 41,000 gallons to be delivered under a former agreement. The price depended on the market value at the time of delivery. Upon making up the account after the full delivery, it appeared that a sum exceeding \$3600 remained due beyond the amount of the note. As to this sum, it is beyond question that there was no extension of credit, and that it was payable when the delivery was completed.

It is not wholly clear whether there was an extension of credit *pro tanto* intended by the parties, upon the giving of the note. The note is contemplated and agreed upon in the contract of sale. No credit upon the molasses is mentioned, and it was by custom, as well as by the absence of any terms of credit in the agreement, to be paid for on delivery. The plaintiff testifies that the note was given for his accommodation. This evidence was not inconsistent with the contract. It is also consistent with the implied admissions of the purchasers when the account was presented for payment. The whole sum due, without reference to the note, was demanded, and no objection was made that there had been an extension of credit as to any part of the price, or that they were entitled to a surrender or credit for the amount of the note. I find no evidence tending to a contrary conclusion, except the receipt given by the plaintiff when he received the note on the 6th May, 1859, the same day the contract bears date.

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In the receipt the note is stated to be an anticipation upon the price of the molasses. This was about six weeks prior to the delivery of the molasses. The purchasers had no security for the note when it was delivered. It follows that the note was advanced upon the credit of the plaintiff, and upon the expectation that he would fulfill his agreement and deliver the molasses, when there would be mutual demands to be settled. Had the purchasers remained in good credit it is probable the plaintiff would have allowed the amount of the note to stand as payment to that extent. It cannot be said, even from the tenor of the receipt, that there was any agreement that the plaintiff should do so. The aspect in which the note was given by the purchasers and received by the plaintiff is important in respect to the obligation of the plaintiff to offer to surrender it before action, and also in respect to the conditional character of the sale. If it was purely an accommodation note, the plaintiff was not required to surrender it until its maturity.

The proper conclusion probably is, that the note did not amount to an extension of credit on the molasses, but upon the delivery of the molasses the purchasers were entitled to hold so much of the price then to become due, as a security that the plaintiff would provide for the payment of the note.

The receipt is subject to explanation. The omission of the purchasers to make any claim in respect to the note when payment for the molasses was demanded of them, and the fact of their insolvency rendering the note worthless as an advance, was a proper subject for the consideration of a jury in determining whether the purchasers had waived a return of the note at the time the plaintiff made the demand of payment. The plaintiff did however produce at the trial, and offer to surrender, a note corresponding in date, amount, time and parties, exactly with the note in question. There is no room for doubt that it was the identical note.

If the question of fraud in obtaining the delivery of the molasses had been submitted to the jury, and they had arrived

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at the conclusion that the purchasers were guilty, it would then have been unimportant to determine whether there was an extension of credit for the amount of the note.

The evidence of the fraudulent intention of the purchasers to obtain the delivery of the plaintiff's property, without payment of the price, was sufficient to require that question to be submitted to the jury. If the intent of the purchasers was fraudulent, (and this was for the jury to determine,) then the production of the note at the trial, and the offer then made to surrender it, was in season even if it should be found that the sale was partly upon credit. (*Nichols v. Michael*, 23 *N. Y. Rep.* 264. *Fraschieris v. Henriques*, 36 *Barb.* 276.) Judge Selden, considering this question in the case cited from 23 *N. Y. Rep.* says, it would not affect the rule "if the notes had been at some period out of the hands of the plaintiffs, provided the possession and exclusive interest was in them at the time of the trial," (p. 273.) This I understand to be the rule in case the notes are, as in the present instance, those of the fraudulent vendee, and not those of a third party. The equity of the rule is clear where the paper is the worthless obligation of an insolvent purchaser.

The justice erroneously dismissed the complaint at the trial, without submitting the question of fraud to the jury, and there should be a new trial for that reason.

In respect to the right of stoppage *in transitu*, that question is not in the case.

The delivery by the plaintiff on board the vessel chartered by the purchasers placed the molasses entirely in their dominion; as much so as if placed in their warehouse. The plaintiff had made his delivery and was entitled to payment. The property had reached its destination, as between the vendor and vendees. The molasses was not *in transitu*, as between them, on its passage from Cuba to New York.

The plaintiff also insisted at the trial that he was entitled to recover upon the ground that the delivery was conditional upon payment of the price, and that without payment no title

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passed to the purchasers. If the note for \$7277.50 was purely an accommodation note, and not an advance upon the security of the molasses when delivered; or if the purchasers, at the time the plaintiff made his demand for payment, waived a return of the note; the jury would have been justified in finding for the plaintiff as upon a conditional sale.

If the note was an advance upon such terms as to entitle the purchasers to claim a lien upon the molasses or its price, or the right to appropriate so much of the price as would be sufficient to meet the note, and there was no subsequent waiver of this right, then the sale cannot be considered as conditional.

The delivery must be considered conditional as to the whole of the molasses or as to none. The plaintiff could not arbitrarily separate so much of the molasses after delivery as would be an equivalent for the balance remaining unpaid, after deducting the note. The plaintiff claimed no such right. He demanded payment of the whole price, without reference to the outstanding note. He must stand on the case as made by his demand of the purchasers.

I am unable to perceive that the laws prevailing in Cuba have much to do with the case, except as they bear upon the question of fraud. These laws do not relate to the construction of the contract. Had the molasses been in any of the ports of Cuba when payment was demanded and refused, no doubt the laws there prevailing would have been enforced. When the plaintiff was in a condition to claim a surrender of the molasses, it no longer remained within the jurisdiction of the legal authorities of that island. Those Spanish laws which were introduced in evidence at the trial, relate to rights and remedies which cannot be enforced elsewhere, when the property comes within another jurisdiction. The purchasers may have desired to evade the operation of those laws, and hastened the departure of the vessel having the plaintiff's property on board, for that purpose. At least

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that may have been a proper consideration for the jury in relation to the question of the intent of the purchasers.

The order dismissing the complaint should be set aside, and a new trial directed, with costs to abide the event.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham, Justices.*]

ERICSSON vs. JAMES BROWN and STEWART BROWN.

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A consulting engineer, who renders services as such, is not within the language, or the policy or reason, of the 10th section of the act of April 11, 1849, incorporating the New York and Liverpool United States Mail Steamship Company, which provides that the stockholders shall be individually liable for debts due and owing to their "*laborers and operatives*" for services performed for the corporation.

APPEAL from a judgment entered upon the report of a referee. The action was brought against the defendants, as stockholders of the New York and Liverpool United States Mail Steamship Company, to recover for services rendered to the company by the plaintiff in the capacity of civil engineer. The plaintiff had previously recovered a judgment against the corporation for the amount claimed, and an execution issued thereon had been returned unsatisfied. The action was referred to a referee, who found, as matter of law, that the plaintiff at the time of the performance by him of the services did not occupy or hold toward the company the relation of laborer or operative, and did not render and perform such services in the character or quality of a laborer or operative of said company, within the true intent and meaning of the 10th section of the act of incorporation of said company. And that the plaintiff was not entitled to recover of the defendants in this action, and that the complaint be dismissed with costs.

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E. Sprout, for the appellant.

Clarkson N. Potter, for the respondent.

By the Court, PECKHAM, J. In the act incorporating "The New York and Liverpool United States Mail Steamship Company," passed April 11, 1859, section 10, is the following provision: "The stockholders of the said company shall be jointly and severally individually liable for all the debts that may be due and owing to all their laborers and operatives for services performed for said corporation." From the 9th of April to the 10th of October, 1857, the plaintiff, as consulting engineer, rendered services at different times upon some twenty different days, for said company, of the value of \$500, as particularly stated in his account.

The charge is first stated in the account in this form: "For professional services as consulting engineer," \$500, and the particular items are then set forth. The plaintiff is a very able and eminent engineer, and his services were found by the referee before whom the cause was heard, to be of the value charged.

The plaintiff brought an action against these defendants, as stockholders in the company, claiming to recover for his said services, under the section of the act before quoted. The referee, after finding the facts, reported for the defendants, on the ground that the plaintiff was not a "laborer or operative," within the meaning of the act. The plaintiff has appealed from the judgment rendered thereon, and the only question is, was the referee correct in his interpretation of the statute.

First. Was the plaintiff within the language of the act? If we should attempt to define the plaintiff in reference to the services he rendered, we should scarcely describe him as a "laborer" or an "operative." We should not regard such language as apt or appropriate. Such words we should ordinarily apply to an entirely different class of men. To a class

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who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands, rather than their heads. Operative, though of very nearly the same signification, is somewhat more comprehensive than labor. The legislature enacted that ten hours should be a day's work, for mechanics and laborers on all public works. (2 R. S. 5th ed. p. 828, § 164.) Could it be contended that the plaintiff would be included in such an enactment, under the word "laborers?" I think not. He would no more be included than a lawyer who rendered professional services. The services of the plaintiff were very like those rendered by the lawyer. Each may involve some manual labor, but that is the incident, rather than the principal of the service. The plaintiff in my opinion correctly described his services as "professional" as contradistinguished from those of a "laborer" or "operative."

Second. Is the plaintiff within the policy or reason of the law? The purpose of the legislature was to protect a class of men not well qualified to protect themselves. Men who usually labor for small compensation, and who are regarded, to a certain extent, as in the power of their employers—men who usually take no security for their services, who would generally be dismissed for requiring it, and therefore never make the attempt. Though the plaintiff in this instance has failed to take security, he obviously does not belong to the class referred to. I believe the legislature has not considered professional men as requiring the aid of such laws. Clearly the law did not intend to make the stockholders liable for all the debts of this company. It does not protect the merchant, though his demand be just as worthy and honest; it does not protect the lawyer. As a general thing they take care to protect themselves.

The plaintiff therefore, in my judgment, is neither within the language nor the reason of the law. The decision in *Conant v. Van Schaick*, (24 Barb. 87,) does not touch this case.

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The finding of facts by the referee covers the whole ground. If the plaintiff should desire to review the decision of this court, facts may be settled here.

The judgment is therefore affirmed, with costs.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham, Justices.*]

WHITING vs. BARNEY and others, executors &c.

Where professional communications are made by two or more clients jointly, to their mutual legal adviser, the seal of confidence can only be removed by *all* of them. The consent of even a majority is not sufficient; and one or more of them cannot require a disclosure of the communication, as evidence against the others, without their consent.

In a litigation subsequently arising between the parties, out of the very matter respecting which they took advice, one of them cannot, as against the other, and without his consent, call upon the attorney to disclose the communication made to him in professional confidence, by *both*, jointly. *JOHNSON, P. J.* dissented.

Nor will the fact that one of the parties, who has since died, might, were he living, be called upon to prove the facts which were stated by him to the attorney, entitle the other party to the testimony of the attorney.

Communications made by a lender to his attorney, respecting a loan, after the making thereof, when no one else was present, and which were drawn out in consequence of the confidential relation existing between the lender and the attorney, are also privileged.

THIS was an appeal from a judgment entered at a special term. The action was brought to set aside and cancel a bond and mortgage, executed by the plaintiff to David Barney, the defendants' testator, on the ground of usury. On the trial, *John P. Hulburt* was called as a witness by the plaintiff, and testified: "I live in Auburn; knew Captain Barney in his lifetime; know the plaintiff in this suit; I recollect their being at my office at one time, together, for the purpose of a money transaction; it was on the 25th of June, 1857. They came together, to my office; I was then

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an attorney and counsellor at law ; I think Captain Barney remarked to me that he and Mr. Whiting would like to see me alone ; there were other people in the office, at the time ; we then went into an adjoining room that belonged to my office ; when we got in there, they both spoke on the subject of the business, addressing their remarks to me and to each other, more or less." Question. "What was the subject of conversation between you there?" The counsel for the defendant objected to this question, and to any testimony of what took place at this interview, on the ground that the conversation was privileged ; and the following testimony was taken subject to the objection. Answer. "The subject was a proposed loan of money from Captain Barney to the plaintiff, the terms, amount, condition and manner of effecting the loan. I think Captain Barney first said that the plaintiff was desirous of loaning some money from him, and that they had had some conversation on the subject. That the plaintiff wanted the loan of \$600, and that he could not let him have that amount at that time, nor could he tell exactly what amount of money he had on hand then, but with what he had on hand, and what he could raise soon he could make out the amount which the plaintiff wanted, if the terms could be agreed upon. Barney said that he and the plaintiff had had conversation in respect to those terms, and that the plaintiff had proposed or agreed to allow him twelve per cent interest ; I cannot tell which. Barney then asked me if there was any way that that amount of interest could be legally taken by him ; if I could fix it in such a manner that it would be legal between them," &c. "There was some talk about how the plaintiff was to secure the loan. Barney said that the plaintiff owned real estate, so situated that he could not, or did not like then to execute a mortgage, but the plaintiff would give his note, if that would answer, for what he might receive on that day towards the \$600 ; and he told the plaintiff that he should want some security up to the time that he could give security on his real estate, and asked the plain-

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tiff if he could not get him a note with indorsers, &c. and bring it to me and take up his individual note, then to be given. * * * Subsequently Barney said that when the exchange of notes was made, the plaintiff must deposit something with me towards the extra interest." The money the plaintiff had, with his bank account, amounted to \$366. The witness drew a note for that amount, which was signed by the plaintiff, and the money paid over to him by Barney. The witness was to keep the note, till the indorsed note and the deposit of extra interest should be brought to him ; and it had been in his possession ever since.

The witness was then asked, "Had you any subsequent conversation with Captain Barney, in reference to the exchange of notes?" The question was objected to by the counsel for the defendants, on the ground that the communication inquired for was privileged ; and the testimony was taken subject to the objection. Answer. "I had. Captain Barney came to my office and told me that the plaintiff had given him a note, in place of the one deposited with me, that was satisfactory to him. I then asked him if I should give this note to the plaintiff. He told me not to give up the old note, 'for,' said he, 'there has been no extra paid yet ;' and he told me to keep the note, and what memorandum to make on it." "Barney gave the reason why he wanted this disposition made of the note. That there was something yet to be done by the plaintiff ; that he had not, thus far, complied with the agreement, as to the amount of interest above seven per cent." Question. "Had you any conversation with Captain Barney after that, in which the subject of a mortgage given by the plaintiff and his wife to him was spoken of? If so, what was it?" This question was also objected to by the counsel for the defendant, as calling for a privileged communication, and the following testimony was taken subject to such objection. Answer. "I subsequently saw Captain Barney, at my office, and he told me that he had let the plaintiff have more money, and that he had taken a mortgage from

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the plaintiff on real estate, and embraced in it the amount loaned at my office, as also the second loan." On his cross-examination, the witness testified that he was Barney's general legal adviser, in relation to most matters of business; at times both as to his investments and collections of money. That he did about all his law business—all, as far as he knew—and his business pertaining to the completion of loans. That at the time of the first conversation, he had business in his hands, for Barney, in matters between him and other persons, as well as at the time of the second conversation.

The justice, at special term, directed a judgment to be entered, in favor of the plaintiff, for the relief demanded in the complaint. The defendants excepted to the decision, and to the refusal of the court to strike out the testimony objected to.

N. T. Stephens, for the appellants.

S. Giles, for the respondent.

J. C. SMITH, J. The principal question in this case is whether the communication was privileged, which the witness Hulburt testified was made to him by the defendants' testator, on the 25th of June, 1857. On that occasion the testator and the plaintiff, his son-in-law, went together to the office of the witness, who was an attorney at law, and had been for many years the testator's legal adviser, and after retiring with him to a private room, the testator, in the presence of the plaintiff, made to the witness the communication in question in relation to the terms and amount of a proposed loan of money from the testator to the plaintiff, for the purpose of getting his advice respecting the legal effect of their contemplated arrangement.

If I rightly apprehend the facts of the case, the plaintiff was present, not as a mere bystander or witness; there was no controversy between him and the testator, and none was

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expected; but the advice of the attorney was sought by them jointly. As is said in the opinion delivered at special term, "the evidence fails to show that the witness was acting as the legal adviser of one party more than the other." The precise question, therefore, is whether in a litigation subsequently arising between the parties out of the very matter respecting which they took advice, one of them may, as against the other, and without his consent, call upon the attorney to disclose the communication made to him in professional confidence, by *both*, jointly.

No rules of evidence are better established than that confidential communications, made by a client to his legal adviser, are privileged; that the protection extends to every communication which the client makes to his legal adviser, for the purpose of professional advice or aid, upon the subject of his rights or liabilities; and that the seal of the law, once fixed upon them, remains forever, unless removed by the *party himself* in whose favor it was there placed.

It seems to result necessarily from these rules, that where professional communications are made by two or more clients jointly to their mutual legal adviser, the seal of confidence can only be removed by *all* of them; that the consent of even a majority is not sufficient; and that one or more of them cannot require a disclosure of the communication as evidence against the others, without their consent.

Unquestionably, the communication in this case was so far privileged as that the attorney would not be required or permitted to disclose it as a witness in favor of a *third* person, against both his clients, without their consent. Even if the suit of the third person were against one of them alone, the consent of *both* would be requisite. This position is sustained by several adjudications. (*Robson v. Kemp*, 4 *Esp.* 233. *Same v. Same*, 5 *id.* 52. *Doe dem. Strode v. Seaton*, 2 *Ad. & El.* 171. 29 *Eng. Com. Law R.* 62. *The Bank of Utica v. Mersereau*, 3 *Barb. Ch. R.* 528.) But the communication cannot be both privileged and open. If the mouth of

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the attorney is closed as to one person it is so as to all the world. I am unable to see upon what principle the *plaintiff* can call upon the attorney to disclose a communication which the law will not require or permit him to divulge as a witness at the request of any other person, without the consent of the defendants.

The case would have been materially different if the parties, when they went to the attorney, had been litigants, or in dispute; or one had preferred a claim against the other, or had *exclusively* employed the attorney, and sought his advice; or the attorney had been called on merely to *witness* a transaction between the parties. In either of those cases the communication would not have been privileged, as against *any* one. But it is claimed by the plaintiff that the parties were *adverse* to each other, as they sought advice respecting a transaction in which one was a borrower and the other a lender. It is true they contemplated a loan by one to the other, but it had not been made, and they were mutually desirous of learning whether the mode in which they proposed to effect it would be lawful. But even if they merely employed the attorney to draw an agreement, by which one became the debtor of the other, their communications in respect to the business in hand would have been privileged. In *Robson v. Kemp*, and also in *Strode v. Seaton*, (*sup.*) the parties were vendor and vendee, and the attorney was employed to draw the conveyance.

It is also claimed by the plaintiff that he has a right to the testimony of the attorney, inasmuch as he might call the defendants' testator, if he were living, to prove the facts which were stated by him to the attorney. Possibly, under the modern statute permitting a party to call his adversary as a witness, the party called may be required to testify to any fact which could be proved by his declarations to his attorney, if the latter were permitted to testify. Now, as before the statute, the *attorney* is not permitted or required to violate the confidence of his client. I think it may be

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confidently asserted that the law never required or permitted the *legal adviser*, without the consent of his client, to testify to a communication otherwise privileged, simply because it could be proved by *another* witness. Thus, in *Carpmeal v. Powis*, (1 *Phil.* 687,) it was held that a solicitor is not at liberty to disclose communications which he had had, either with his client, or with the *agent* of his client; but, *semble*, if the agent had been examined, he would have been bound to answer. So, in *Bunsbury v. Bunsbury*, (2 *Beav.* 173,) it was held that communications made through a *third person*, from a client to a solicitor, are privileged, if otherwise entitled to be so. To the same effect is *Walker v. Wildman*, (6 *Mad.* 47.)

My attention has not been called to any reported case which seems to me to authorize the reception of the testimony in question. The first case cited in the opinion delivered at special term is *Coveney v. Tannahill*, (1 *Hill*, 33.) The plaintiff in that case, in adjusting an account with a third person, and procuring a written acknowledgment of a balance due, called in a counsellor at law to witness the transaction, and it was held that he should be permitted to testify without the leave of his client; the court remarking "that what was done and said between the parties to the transaction, in the way of business, could not be turned into a confidential communication between attorney and client merely because the plaintiff had an attorney present to hear and see what took place." That decision, the correctness of which no one will question, would have been applicable to the case in hand, if Barney and Whiting had merely called in Hulburt to *witness* their agreement, and had not stated it to him for the purpose of getting his professional advice. In that very case Bronson, J. commenting on the case of *Robson v. Kemp*, (*supra*,) suggested as a reason for the decision that "it may have been thought important that the witness acted as attorney for *both* parties." In *Grif-*

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5th v. Davies, (5 *Barn. & Ad.* 502; 27 *Eng. Com. Law R.* 114,) the witness, as the attorney of the defendant, went with him to the plaintiff, and on that occasion heard a conversation between them respecting a proposed compromise of the plaintiff's demand; and it was held that this was not a confidential disclosure to the attorney, but an open communication from one adversary to another, witnessed by the attorney of one party.

Ripon v. Davies, (2 *Nev. & Man.* 310; 28 *Eng. Com. Law R.* 358,) was assumpsit for work and labor. In order to show the services, the plaintiff called a person who had been the attorney of the defendant, to prove admissions made by the defendant, and by the witness as his attorney, in the course of a conversation between them and the plaintiff, subsequently to the commencement of the suit. Held that this was an open communication made by one party to a suit to the other, and not a private communication made by the client to his attorney.

Shore v. Bedford, (5 *Man. & Gr.* 271; 44 *Eng. Com. Law R.* 149,) was an action upon the warranty of a horse. Defendant contended that he acted in the matter only as the agent of one Pithers. Before suit the parties went together to the office of one Ormand, who had been the attorney of the plaintiff, but had never acted for the defendant, and on that occasion the defendant admitted, in the presence of the witness, a clerk of the attorney, that he had bought the horse from Pithers, and he instructed the witness to write to Pithers for the price, which he did. The clerk was held competent to prove this. The court regarded it as simply the case of two parties having a misunderstanding, going to the attorney of one of them, and coming to an arrangement. It is to be inferred from a remark of Erskine, J. that in his opinion, if the parties had come for the purpose of consulting the attorney as to the best means of seeing Pithers, the communication would have been privileged.

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In *Perry v. Smith*, (9 *Mees. & Wels.* 681,) upon the sale of an estate, the same attorney was employed by the vendor and the purchaser, and after the sale the defendant, being applied to by the attorney about the payment of the purchase money, said he was not ready to pay, and asked for time. Held that this communication was not privileged, as it was made by the defendant to the witness, not as his own attorney, but in his adverse character of attorney for the vendor. In neither of the last four cases was any statement made to the attorney in his *professional* character. In the first two the attorneys were mere *witnesses*, and in the last two they were the attorneys of the *opposite* parties only.

In *Weeks v. Argent*, (16 *Mees. & Wels.* 816,) it appearing that each party, with his own attorney, was present when the note in suit was given to secure a debt which one party was owing to the other, it was held that communications made by the plaintiff to his attorney on that occasion, in the presence of the opposite party and his attorney, were not confidential, as they were not made to his attorney alone. The distinction is obvious between this case and the one at bar, where no one was present but the attorney and his clients. These are all the cases cited at special term. They seem to me to fall short of sustaining the ruling below, and I apprehend they go as far in that direction as any cases that can be found in the books. I am of the opinion that the testimony of the attorney, respecting the communication made on the 25th of June, was improperly received.

I also think that the communications made by the testator on the occasions subsequent to that date, spoken of by the witness, were privileged. They were made by the testator to his attorney, when *no third person* was present, and although they relate to the loan, which was the subject of conversation at the first interview, yet they are not a mere repetition of the statements then made, but are new and independent communications—in some instances—of facts which transpired subsequently to the first interview, and all were unquestion-

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ably drawn out in consequence of the confidential relation which existed between the testator and the witness.

For these reasons I think the judgment should be reversed and a new trial ordered.

WELLES, J. concurred.

JOHNSON, P. J. dissented.

New trial granted.

[MONROE GENERAL TERM, June 2, 1862. *Johnson, J. C. Smith and Welles, Justices.*]

 CARROLL vs. THE CHARTER OAK INSURANCE COMPANY.

Where an insurance company accepts from the assured the premium for a renewal, and renews the insurance, it will be deemed to have declared the contract of insurance to be valid, and to have waived the forfeiture, if any has occurred by reason of the omission of the insured to give notice of other insurances and have them indorsed on the policy.

Under such circumstances, the company is precluded from asserting either that the renewal was inoperative, or that the policy became void immediately after it was renewed, by reason of circumstances of which it was fully cognizant at the time of renewal, on the principle of estoppel *in pais*. JOHNSON, P. J. dissented.

A policy of insurance invalidated by reason of a neglect to give notice of other insurances, may be revived and rendered binding by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding, and with a full knowledge of, the forfeiture.

Notwithstanding an express provision in a policy that none of its conditions "can be waived, except in writing signed by the secretary," it is competent for the parties to rescind or modify that provision, by a valid agreement, even in parol; and an *executed* agreement to renew a forfeited policy clearly will have that effect.

The only interest which passes by an assignment of a policy *after* a loss has occurred, and after the insurers have been served with notice thereof and with the preliminary proofs, is the claim or debt which the insured holds against the insurers for the amount of the loss.

Hence, such an assignment is not a breach of a condition in the policy that

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the interest of the assured, in the policy, is not assignable unless by the written consent of the insurers; and that in case of any transfer or termination of such interest without such consent, the policy shall from thenceforth be void.

It seems that a provision, in a policy, prohibiting a transfer of the interest of the assured *after* loss, would be illegal and void.

THIS was an action brought upon a policy of insurance. The cause was tried at the Monroe circuit, before Justice JOHNSON and a jury. The plaintiff proved the incorporation of the defendant, and that it had power to insure against loss by fire, in this state. That on the 6th of November, 1858, it issued a policy of insurance to Burns & Hughes, by which it insured their stock of goods against loss by fire, for one year, in the sum of \$1000. That on the 29th of November, 1858, Burns & Hughes sold the goods to Burns & Vance, and with the consent of the defendant assigned the policy to them. That on the 6th of December, 1858, Burns & Vance paid the defendant ten dollars, the premium for another year, and the defendant renewed the policy for another year. That on the 10th day of December, 1859, the insured property was destroyed by fire. That the value of the property destroyed was \$6000 and upwards, and that due notice of the loss, and the preliminary proofs, were served, That after the service of such proofs, and on the 21st day of December, 1859, Burns & Vance assigned to the plaintiff such policy of insurance. It was also proved that after the issuing of the policy Burns & Vance procured four other policies of insurance, upon the same goods, of \$1000 each, as follows: one, December 11, 1858; one, July 22, 1859; one, September 22, 1859; and one, September 28, 1859; none of which were mentioned in, or indorsed upon the policy in suit.

The plaintiff offered to show that notice of these policies was given to the agent of the defendant, at the time of the renewal of said policy. The defendant objected to this testimony, and the court excluded the same. Exception. The plaintiff further offered to prove that immediately after the fire,

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the assured gave written notice to the defendant of the issuing of the other policies, and that the defendant ratified the act of the agent in renewing the policy in suit, by retaining the premium. The counsel for the defendant objected to this testimony, and the court excluded the same. Exception. The counsel for the plaintiff further offered to prove that, after the fire, and after notice of the issuing of the other policies, and after service of the preliminary proofs, the defendant proceeded to examine the assured on oath, in writing, under one of the provisions of its policy. The counsel for the defendant objected to this testimony, and the court excluded the same. Exception. The plaintiff also offered to prove that after such examination on oath, the defendant served notice in writing, on the assured, to produce their books and papers, under a provision of the policy. The defendant objected to this testimony, and the court excluded the same. Exception.

The policy in question contained the following provision : " And further provided, that in case the assured or any other persons or parties interested shall have already procured, or shall hereafter procure, any other policy of insurance, or instrument purporting to be a policy of insurance, against loss by fire, on the property or any part thereof hereby insured, (whether such instrument be valid or binding as a contract of insurance upon the parties thereto, or either of them, or not,) not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And that this policy is made and accepted upon and in reference to the application, plan, descriptions or survey filed in this office, and the terms and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereunto in all cases not herein otherwise specially provided for, and this company will not be bound by any instrument, record or statement not referred to or contained in this policy, and no condition of the policy can be waived except in writing, signed by the secretary.

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This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same.

The interest of the assured in this policy is not assignable unless by consent of this company, manifested in writing; and in case of any transfer or termination of the interest of the insured, by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

The following is one of the conditions annexed to the policy: "Policies of insurance subscribed by this company shall not be assigned, transferred or sold, either before or after loss, without the consent of the company expressed by indorsement thereon. In case of assignment, transfer or sale, without such consent, whether of the whole policy, or of any interest in it, the liability of the company shall then cease."

The plaintiff rested, and the defendant moved for a nonsuit, upon the grounds:

1. None of the above mentioned policies upon the insured property were mentioned in, or indorsed upon, the policy in suit.

2. The policy was assigned to the plaintiff without the consent of the defendant.

The court nonsuited the plaintiff, and his counsel excepted.

The court ordered the case to be heard in the first instance at the general term.

J. C. Cochrane, for the plaintiff. I. A contract of insurance may be made by parol. If it can, written provisions in a policy may be waived or changed, for a good consideration, by parol. If the parties had power to change the original contract, the evidence excluded was material. (*Phil. on Ins.* §§ 8, 10. *Ripley v. Aetna Ins. Co.*, 29 Barb. 552. *New York Central Ins. Co., v. National Protection Ins. Co.*, 20 Barb. 468. *Pierrepoint v. Barnard*, 2 Seld. 279.)

II. The defendant having accepted and retained the pre-

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mium paid on renewal, with a full knowledge of all the facts, is estopped from setting up a forfeiture previously incurred. (2 *Am. Lead. Cas.* 625, and cases there cited.)

III. The assignment after the loss was not a forfeiture of the policy. *Courtney v. N. Y. Ins. Co.*, 28 *Barb.* 116. *Goit v. National Protection Ins. Co.*, 25 *id.* 189. 2 *Am. Lead. Cas.* 623.)

W. F. Cogswell, for the defendant. I. The evidence offered by the plaintiff, to obviate the objection to his right to recover, on account of other insurances not mentioned in, or indorsed upon, the policy, was properly excluded. *Lamatt v. The Hudson River Fire Ins. Co.*, 17 *N. Y. Rep.* 199. 7 *Cush.* 175. 11 *id.* 265. 6 *Gray*, 169. 16 *Peters*, 495. 21 *Missouri Rep.* 97.)

II. The plaintiff was properly nonsuited: 1st. Upon the ground of the other insurances not mentioned in, or indorsed upon, the policy. (*Cases above cited.*) 2d. On the ground that the assignment of the policy destroyed its validity, or at least transferred no right of action to the plaintiff. (*Dey v. Poughkeepsie Mutual Ins. Co.*, 23 *Barb.* 623.)

J. C. SMITH, J. The plaintiff offered to show that at the time when the agent of the defendants received the premium paid by the plaintiff's assignors for a renewal of their insurance, and in consideration thereof renewed the policy in suit for another year, he was notified of the policies issued by other companies which are now interposed as a defense. The authority of the agent to renew is not questioned. Indeed the case states that the policy was renewed by the defendants. It seems to me that the defendants having thus by an unequivocal act declared the contract of insurance to be then valid, notwithstanding the other insurances, and having thereby induced the plaintiff's assignor to pay the premium for a renewal, must be deemed to have waived the forfeiture, if any had occurred by reason of the omission of the insured

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to give notice of the other insurances and have them indorsed on the policy. It certainly would be unjust to permit them now to assert either that the renewal was inoperative, or that the policy became void immediately after it was renewed, by reason of circumstances of which they were fully cognizant at the time of renewal; and assuming the truth of the offer, I think they are precluded from doing so, on the principle of estoppel *in pais*. (5 Denio, 154. 19 Barb. 440. 23 Conn. Rep. 244. 2 American Lead. Cas. 625. 1 Phil. on. Insurance, 586.)

No question is entertained but that the provision of the policy which requires that notice be given of other insurances, and that they be "mentioned in or indorsed upon" the policy, is valid, and that a breach of it renders the contract void. (*Gilbert v. The Phoenix Insurance Company*, 36 Barb. 372, and cases cited on page 377.)

But I understand the law to be that a policy of insurance thus invalidated may be revived and rendered binding by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding, and with a full knowledge of the forfeiture, as is asserted by the editor of the *American Leading Cases*. "The weight of authority, in modern times, seems to support the just and reasonable proposition that every condition of avoidance or forfeiture should be construed as meant for the benefit or protection of the person in whose favor it is reserved, and as giving him the option of abrogating the contract, or of setting it up and insisting on its performance." (*Vol. 2, pp. 624, 625, and cases there cited and commented upon. 25 Barb. 191, 2. 20 id. 474, 5.*)

The defendants insist that their acts do not amount to a waiver, by reason of the express provision of the policy that none of its conditions "can be waived except in writing signed by the secretary." But it was competent for the parties to rescind or modify this provision, by a valid agreement even in parol; and the *executed* agreement to renew the pol-

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icy clearly had that effect. (7 Cowen, 48. 9 *id.* 115.) The parties having thus mutually agreed to depart from the provisions of the policy, as to the manner in which a waiver of the forfeiture in question should be manifested, the rights of the insured under the new agreement should be protected, especially after it has been completely executed on their part. (2 Seld. 279.)

I am of the opinion that the offers of the plaintiff, so far as they tended to show a waiver by the defendants of the alleged forfeiture, with full knowledge of all the material circumstances, were improperly rejected. If the views above expressed are correct, the proof offered would have obviated the first ground upon which the nonsuit was ordered.

The nonsuit was also placed on the further ground that the policy was assigned to the plaintiff without the consent of the defendants. The question involved in this ruling arises upon the following clause in the policy: "The interest of the assured in this policy is not assignable, unless by consent of this company manifested in writing; and in case of any transfer or termination of the interest of the insured, by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." The language of the case is that the "policy" was assigned to the plaintiff, but as it also states, explicitly, that the assignment was *after* the loss, and after the defendants had been served with notice of the loss, and with the preliminary proofs, it is clear that the only interest which passed by the assignment was the "claim" or debt which the insured held against the defendants for the amount of the loss. It was not claimed at the trial that the assignment did not carry the *debt*. The only point taken was that it was without the consent of the defendants. The assignment, therefore, was not a *breach* of the condition expressed in the clause above cited. The clause does not prohibit the assignment of any "claim" of the insured "after" loss. In this respect the case differs materially from

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that of *Dey v. The Poughkeepsie Mutual Insurance Company*, (23 Barb. 623.)

Even if the policy had contained a provision prohibiting a transfer of the interest of the insured *after* loss, it seems that, according to the weight of authority, the provision would have been illegal and void. (*Goit v. The National Protection Insurance Company*, 25 Barb. 189. *Courtney v. The New York City Insurance Company*, 28 *id.* 116. 2 *Am. Lead. Cas.* 623.) But it is not necessary to pass upon that question, as it does not arise in this case.

It follows from these views that there should be a new trial.

WELLES, J. concurred.

JOHNSON, P. J. dissented from that portion of the foregoing opinion which holds that the facts offered in evidence by the plaintiff were sufficient to preclude the defendants from setting up the forfeiture occasioned by the plaintiff's omission to give notice of other insurances.

New trial granted.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, James C. Smith and Welles*, Justices.]

FLOYD, adm'r &c. vs. FITCHER and CASE, ex'rs &c.

A testator, by one clause of his will, gave to his daughter, S. F. and his two daughters-in-law, E. P. & S. P. each, an annuity of \$70, payable in semi-annual payments to each, during life; and for the purpose of securing their payment, he directed his executors to either retain so much of his productive property as would be sufficient to produce the annuities, or to safely invest a sum sufficient for that purpose. By a subsequent clause he further gave to S. F., E. P., and S. P. each, "the principal of, or the sum, set apart to produce said annuities, respectively, to dispose of during the lifetime of

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each, as she may desire; but no such disposition thereof to take effect until after her death;" and in the same clause he directed that in case either of said legatees should die without having made any disposition of the principal of her annuity, it should be paid to her children then living, in equal shares. The executors set apart a principal sum sufficient to produce the annuity to S. F.; and the annuity was regularly paid to her during her life. She died without having made any disposition of said principal, and leaving surviving her three sons and two grandchildren, the offspring of a predeceased daughter. The principal thus set apart still remained in the hands of the executors.

Held that the gift to S. F. of the principal sum, with the unlimited power of disposal at her pleasure, necessarily carried with it the absolute ownership; the restriction that no disposition of the fund, made by her, should take effect until after her death, having no other effect than to continue the principal sum in the hands of the executors until her death, in order that the income might be secured to her during life.

Held, also, that the legacy vested absolutely, in S. F.; and the further limitation to her children surviving her was repugnant to the bequest and void; and that the administrator of S. F. was entitled to the principal set apart to produce the annuity given to her.

THIS was a case submitted to the court, without action, under section 372 of the code of procedure, by the plaintiff as administrator of the estate of Sarah Freeman, deceased, and the defendants as executors of the last will and testament of William Pepper, deceased. William Pepper, a construction of whose will was sought, died at Vernon, Oneida county, May 1, 1849. His will was admitted to probate by the surrogate of Oneida county, on or about the 21st of May, 1849. The provisions of that will, so far as material to the questions involved, together with the subsequent facts, are set forth in the opinion of the court.

Nicoll Floyd, for the plaintiff.

B. McIntosh, for the defendants.

By the Court, J. C. SMITH, J. The questions in this case depend upon the construction to be given to the provisions of the will of the defendants' testator respecting the be-

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quest to his daughter, Mrs. Freeman, the plaintiff's intestate. By one clause of his will, the testator gave to his said daughter, and his two daughters-in-law, naming them, each an annuity of seventy dollars, payable in semi-annual payments to each, during life; and for the purpose of securing their payment, he directed his executors to either retain so much of his productive property as would be sufficient to produce the annuities, or to safely invest a sum sufficient for that purpose. By a subsequent clause, he further gave to his said daughter and daughters-in-law, each, "the principal of or the sum set apart to produce said annuities, respectively, to dispose of during the lifetime of each, as she may desire; but no such disposition thereof to take effect until after her death;" and in the same clause he directed that in case either of said legatees should die without having made any disposition of the principal of her annuity, it should be paid to her children then living, in equal shares.

The executors, in pursuance of these directions, set apart a principal sum sufficient to produce the annuity to Mrs. Freeman; and the annuity was regularly paid to her during her life. She died in 1860, without having made any disposition of said principal, and leaving surviving her, three sons and two grandchildren, the offspring of a pre-deceased daughter.

The principal thus set apart yet remains in the hands of the executors, it having been demanded by the plaintiff, as administrator of Mrs. Freeman, on the ground that it was given to her, fully and absolutely, by the will, and that the clause limiting and directing the disposition of it in case she died without having disposed of the same was repugnant to the bequest and void; and the executors having claimed that the principal is to be paid by them to the surviving children of Mrs. Freeman. The object of the suit is to determine these conflicting claims.

The will, in express terms, conferred upon Mrs. Freeman not only the income of the fund during her life, but also the

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right of absolutely disposing of the principal, at her pleasure, subject only to the restriction that such disposition should not take effect until after her death. She had power to dispose of the principal by will, or to sell it during her life, and she could dispose of it, in whole or in parcels, to one person or several, and for such price and on such terms as she might prefer. The gift to her of the principal, with this unlimited power of disposal, at her pleasure, necessarily carried with it the absolute ownership, (*Jackson v. Coleman*, 2 John. 391, and cases there cited by Kent, Ch. J. ;) unless that result was prevented by the direction that no disposition of the fund, made by her, should take effect until after her death.

That restriction had no other effect than to continue the principal in the hands of the executors until her death, in order that the income might be secured to her during life. That it did not prevent the vesting of the principal, nor interfere with her absolute right of disposal, is shown by the case of *Sweet v. Chase*, (2 Comst. 73.) There, a testator, by one clause of his will, gave a legacy to his wife, to be paid out of the avails of the sale of his real estate, and by a subsequent clause he directed his executors to sell such real estate after the death of his wife. Of course, under those provisions, any disposition which the legatee might have made of the legacy in her lifetime, would not have taken effect; that is, would not have transferred the possession of the fund, until after her death, because the legacy was not payable until the happening of that event; which is precisely the effect of the restriction under consideration. Yet in that case the court of appeals held that the legacy vested on the death of the testator; that the legatee had the same right to sell or dispose of it that she had in respect to any other property; and that on her death, if undisposed of by her, it went to her personal representatives, who might enforce the payment, against the executors. In the case of *McLoskey v. Reid* (4 Brad. 334) a testator bequeathed six thousand dol-

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lars, to be invested in stocks, and *not transferable* during the life of the legatee. The restriction in that case, it will be observed, was much broader than the restriction here; yet the surrogate of New York held that it was not a qualification of the gift, but only a mode of enjoyment pointed out, and that the legacy vested, the income being payable to the legatee during her life, and the principal, on her death, to her legal representatives.

As the legacy vested absolutely in Mrs. Freeman, the further limitation to her children surviving her is repugnant to the bequest, and void. (*Attorney General v. Hall, Fitz. 314. Ide v. Ide, 5 Mass. Rep. 500. Jackson v. Robins, 16 John. 537. Helmer v. Shoemaker, 22 Wend. 137.*) In *Norris v. Beyea, (3 Kern. 286,)* and *Tyson v. Blake, (22 N. Y. Rep. 558,)* the primary legatee had no right to dispose of the principal.

It follows from these views that the plaintiff, as administrator of Mrs. Freeman, is entitled to a judgment that the defendants, as executors, pay to him the principal set apart to produce the annuity payable to his intestate.

Judgment accordingly

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles, Justices.*]

ALCESTE BUTTON *vs.* EMANUEL MCCAULEY.

The requirement contained in section 149 of the code, that an answer must contain a statement of any new matter constituting a defense, is imperative. Hence if new matter is not set up in the answer, proof of it should be rejected, although such matter would constitute a full defense to the action. In order to make an exception on account of the rejection of evidence available, the party should make his offer in such plain terms as to leave no room for doubt as to what is intended. If the offer is open to two constructions, he cannot, in a court of review, insist upon that construction

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which is more favorable to himself, unless it appears that it was so understood by the court which rejected the evidence.

In an action by a female, for a breach of promise of marriage, evidence to show that the plaintiff drank to excess, and sometimes to intoxication, without specifying under what circumstances the alleged excesses took place, or that her general reputation, even as to sobriety, is bad, is inadmissible in mitigation of damages.

THIS was an action brought by the plaintiff to recover damages for a breach of promise of marriage. The answer was merely a general denial of the allegations of the complaint. The cause was tried at the Monroe circuit, in October, 1861. The plaintiff was examined as a witness in her own behalf. Her testimony tended to establish the fact of a contract of marriage between herself and the defendant, and a breach of such contract by the defendant. The witness further testified as follows: "The fifth conversation was within a day or so. He wanted to know if I would not shorten the time; whether I would have him or not. I told him I could not think of having a man when there was so much difference in our ages. Then I offered to live with him for a year, for a housekeeper. He would not listen to that; said he would make me a comfortable home." The counsel for the defendant objected to the evidence in relation to making the plaintiff a comfortable home, on the ground that it was immaterial, irrelevant and incompetent, either upon the question of a contract of marriage or upon the question of damages. The objection was overruled by the court, and the defendant excepted. The witness then proceeded as follows: "And leave me well provided for. He said he would build a brick house, costing \$1600, on the small farm, besides his own labor. He would rig it all up in nice style; he would have a nice team and nice conveyance, and I might go where I chose," &c. The counsel for the defendant objected that this testimony was incompetent, irrelevant and immaterial, either upon the question of the existence of the contract, or upon the question of damages. The objection was overruled by the court, and the defendant excepted.

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Other witnesses were sworn, whose testimony tended to confirm that of the plaintiff. The defendant was sworn as a witness, in his own behalf, and his testimony tended to establish the fact that there was no absolute contract of marriage, but that the promise on his part, to marry the plaintiff, was upon certain conditions, which conditions were not fulfilled. The defendant offered to show that the plaintiff, while she was thus living with him, drank intoxicating liquors to excess, and sometimes got intoxicated. This evidence was objected to by the plaintiff and the objection sustained. Exception by the defendant. The jury found a verdict for the plaintiff, for \$500 damages.

The defendant appealed from the judgment.

L. H. Hovey, for the appellant.

Jesse Shepherd, for the respondent.

By the Court, J. C. SMITH, J. If the proof offered by the defendant, that the plaintiff while living with him "drank intoxicating liquors to excess, and sometimes got intoxicated," would have established a full defense to the action, as is claimed by the defendant's counsel, it was nevertheless properly rejected, for the reason that such defense is not set up in the answer. That it is "new matter" within the meaning of section 149 of the code (*sub. 2*) can hardly be questioned. It admits and avoids the cause of action alleged in the complaint. It has been decided that the requirement contained in the section above cited, that the answer "must contain a statement of any new matter constituting a defense," is imperative, (*McKyring v. Bull*, 16 *N. Y. Rep.* 297;) and that a defendant cannot give evidence of any defense not set up in his answer. (2 *Comst.* 501. 2 *Seld.* 179. 20 *Barb.* 468.)

The defendant's counsel now claims that the proof was proper in mitigation of damages, and therefore admissible

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without being pleaded. But the case does not show that it was offered for that purpose. For aught that appears, the offer was made without any statement of its purpose. It was excluded, and properly so, if proposed to establish a defense not pleaded, and for which purpose it is now claimed by the defendant to be admissible; and the defendant did not in any manner call the attention of the judge specifically to the point on which it is now claimed he erred. In the cases of *Willard v. Stone*, (7 Cowen, 22,) and *Bennett v. Smith*, (21 Barb. 446,) cited by the defendant's counsel, the evidence was offered expressly *in mitigation*. In *Travis v. Barger*, (21 Barb. 614,) which was an action for seduction of the plaintiff's daughter, the offer was general, as here, but one of the grounds of objection stated was that "such matters of defense were not set up in the answer," and the testimony was excluded. On appeal to the general term, Birdseye, J. delivering the prevailing opinion, assumed that the offer was made upon the ground that the proof would furnish a complete defense to the action, and not merely that it was admissible in mitigation of damages, and then said: "The judge decided upon the question which was thus presented to him, and rightly excluded the proof, to make out this defense. Instead of offering it again for the purpose of mitigating the damages, for which purpose alone it is now contended it was admissible; instead of presenting to the judge the point upon which alone it is now contended that he erred, and calling his attention specifically to it, so that it might have been passed upon, the defendant chose to let the case be submitted to the jury. And he now raises the question in such a manner that, if successful, he has a chance with another jury, although there was no error committed at the former trial, either in the admission of testimony or the decisions of the court. Such a course ought not to be permitted. It is likely to put the cause in a false position, and to work injustice to the opposite party. The party complaining of the charge of the judge, which is claimed to be errone-

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ous in part only, and in part correct, is required to call attention specifically to the matter complained of, so that the error, if any, may be forthwith corrected. The same principle, in my opinion, applies to a case like the present." These remarks were fully applicable to the case in hand, as for aught that appears, the only question presented to the judge and decided by him, was whether the evidence was admissible to establish a defense not set up in the answer. But if the testimony had been offered in mitigation of damages, I think it would have been properly excluded. The offer was simply to show that the plaintiff drank to excess, and sometimes to intoxication, while living with the defendant, without specifying under what circumstances the alleged excesses took place. They may have occurred prior to the defendant's promise, and with his knowledge. They may even have been induced by his solicitation, and shared in by himself. In either case I apprehend the evidence would not be admissible. In order to make an exception on account of the rejection of evidence available, the party should make his offer in such plain terms as to leave no room for doubt as to what was intended. If the offer is open to two constructions, he cannot in a court of review insist upon that construction which is more favorable to himself, unless it appears that it was so understood by the court which rejected the evidence. This rule was followed by the court of appeals in *Daniels v. Patterson*, (3 Comst. 47,) in which case the offer was quite as explicit and clear, to say the least, as the offer in the case at bar, and the reasoning of Bronson, J. who delivered the opinion of the court, shows the good sense and justice of the rule. Again, it may well be questioned whether the defendant in this action had a right to prove in mitigation of damages, particular acts, unless they showed or tended to show the plaintiff to be unchaste. General character undoubtedly may be inquired into, and the reason assigned for this, in the books, is that the object of the action is not merely a compensation for the immediate injury sustained, but damages

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for the loss of reputation. (*Per Benson, J. in Johnson v. Caulkins*, 1 *John. Cas.* 117.) But general reputation cannot be proved by particular acts. (7 *Cowen*, 635.) Yet as illicit sexual intercourse after marriage is a ground for annulling the marriage contract, there is an obvious propriety in allowing particular acts of a lewd and dissolute character to be proved in mitigation of damages, in actions of this nature. But this reason does not exist in respect to any other vice. But if it is competent to show that on one or more particular occasions the plaintiff drank intoxicating liquors to excess, it is difficult to see why evidence may not be given of particular exhibitions of any other of the numerous frailties of nature, such as gluttony, profanity, lying and many others that might be mentioned. I think it will be found that the cases in the books go no further than to allow proof of particular acts of lewdness or indecency, limiting the evidence, in other respects, to general reputation. In *Johnson v. Caulkins* (*supra*) the defendant was permitted to show, with a view to the quantum of damages, licentious conduct in the plaintiff, and her general character as to sobriety and virtue. In *Willard v. Stone* it was held that the defendant might prove that the plaintiff had been guilty of *indecent* and *lascivious* familiarities with another man. In *Boynton v. Kellogg* (3 *Mass. Rep.* 189) it was ruled that the defendant might show, *in bar*, the bad character of the plaintiff at the time of the contract, unknown to the defendant; or that after the promise she had prostituted herself to any person other than the defendant, and *in mitigation*, that her conduct was *improperly indecent*, after the promise, or before the promise and unknown to him. This ruling was approved in *Palmer v. Andrews*, (7 *Wend.* 142.) The rules laid down in *Sedgwick on Damages* (p. 385) are deduced from these cases. As the defendant's offer was not to show dissolute or unchaste conduct on the part of the plaintiff, or that her general reputation, even as to sobriety, was bad, I think it was not admissible in mitigation of damages.

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The defendant's counsel next insists that the proof offered was admissible "upon the question of the knowledge and recollection of the plaintiff, in respect to the matters to which she testified ; also upon the question of her credibility." This position is untenable. There was no offer to show that she was intoxicated, or under the influence of intoxicating drinks, on any occasion in respect to which she testified ; and particular facts cannot be given in evidence to discredit a witness. (2 *Phil. Ev. C. & H. Notes*, 952.)

The only other question in the case relates to the testimony of the plaintiff, as to what the defendant said in respect to making her a comfortable home, &c. This evidence was clearly admissible. It consisted of declarations made by the defendant in a conversation between him and the plaintiff relating to the subject matter of the action, and a part of which conversation had been proved without objection. It was competent evidence on the question of the alleged contract of marriage between the parties.

The motion for a new trial should be denied.

[MONROE GENERAL TERM, September 1, 1862. *Johnson, J. C. Smith and Welles*, Justices.]

WHITE vs. STAFFORD.

The code has not so changed the law as to allow a husband to examine his wife as a witness, in a case in which she is not a party.

APPEAL from a judgment entered on a verdict. The action was brought for board, care and attendance of the defendant's father, alleged to have been furnished on the express promise of the defendant to pay therefor. On the trial the plaintiff called his wife as a witness on his behalf, to prove such board &c. and the alleged promise. The defendant objected to her as a witness, on the ground that she was

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the plaintiff's wife. The court overruled the objection and admitted her; to which the defendant duly excepted.

Mann & Walker, for the appellant.

Humphrey & Parsons, for the respondent.

By the Court, DAVIS, J. The only question in this case is as to the admissibility of the plaintiff's wife as a witness on his behalf. That husband and wife are not admissible as witnesses for or against each other (except in certain cases not necessary now to be referred to) is an elementary rule of the common law. "The husband and wife," says Chancellor Kent, "cannot be witnesses for or against each other. This is a settled principle of law and equity, and it is founded as well on the interest of the parties being the same, as on public policy. The foundations of society would be shaken, according to the strong language in one of the cases, by permitting it." (2 *Kent's Com.* 178, 179.) "It has been resolved," says Lord Coke, "that a wife cannot be produced against her husband, as it might be the means of implacable discord and dissension between them, and the means of great inconvenience." (*Co. Lit.* 6, b.) "The reason for excluding the husband and wife from giving evidence for or against each other is founded partially on their identity of interests, and partly on a principle of public policy which deems it necessary to guard the security and confidence of private life even at the risk of an accidental failure of justice." (1 *Phil. Ev.* 77.) "If a wife were a witness for her husband she would be under a strong temptation to commit perjury, and if against her husband it would be contrary to the policy of marriage, and might create much dissension and unhappiness; so vice versa, of the husband." (*Bull. N. P.* 286. 4 *T. R.* 679. 2 *id.* 263.) In *Hasbrouck v. Vandervoort*, (5 *Seld.* 153,) Johnson, J. on an examination of all the authorities, came to the conclusion that "the rule of exclusion of husband or

wife where the other is a party or interested in the event, depends merely upon the existence of the relation, and not at all upon the existence in the party offered as a witness of an interest in the event, independent of that which the law attributes to him by reason of the marriage relation." (*See 5 Seld. ubi supra, and cases there cited.*)

This rule of exclusion is equally imperative in both civil and criminal proceedings, and is not founded on that *pecuniary interest* which might always be waived or released. When the authorities speak of "*identity of interest*" as one ground of the rule they undoubtedly intend that *unity of persons and rights* which is the basis of the common law theory of the marital relations. Has the principle so long and well established, been overthrown or changed? There are but two sections of the code—the 398th and 399th—that are claimed to have had any such effect. On referring to them it is well to bear in mind another principle of law, which is that the established rules of the common law are to be changed only by express enactment or necessary implication. Where the code has made, or attempted to make, such change, its own rule of construction is to be applied; (*Code, § 467;*) but where the scope and object of the provision are satisfied by the natural import of its letter, there is no occasion for liberal construction. The 398th section is in these words: "No person offered as a witness shall be excluded by reason of his interest in the event of the action." This provision annihilates, at a blow, every objection to the admissibility of witnesses on the ground of pecuniary interest. So far, therefore, as the rule excluding husband and wife may be supposed to stand on that ground, it is overthrown by this section; but as we have seen by the preceding citations, the rule of exclusion is based upon the broader and higher ground of public policy. It is obvious that section 398 was only intended to remove the disability of pecuniary interest, and not to affect other grounds of exclusion. But it is not necessary to pursue this point; for in the case of *Hasbrouck*

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v. *Vandervoort*, above cited, the court of appeals have distinctly adjudicated that this section did not affect the rule under consideration. Section 399 relates exclusively to the "examination of parties to the action. It first provides a general rule for such examination, to wit: "A party to an action may be examined as a witness in his own behalf, or in behalf of any other party, subject to the same rules of examination as any other witness." To this general rule it declares two exceptions, to wit: "except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transactions had personally between the deceased person and themselves; and except, also, that neither husband nor wife shall be required to disclose any communication made by one to the other." It is quite apparent to my mind that this general rule, which provides that a *party to an action* may be examined in his own behalf, neither abrogates nor affects any other established rule which excludes or admits persons *not parties to the action*. The latter rule is not within the object or letter of this section, the provisions of which are fully answered when they are applied to *all parties real and nominal*. To go farther and say that the section has effected a sweeping change of the established common law rule, in a case not within its letter or spirit, would be in direct violation of the salutary principle that conserves the common law against innovation by mere intendment. But it is said if husband and wife are admissible as witnesses for or against each other when parties to the action, why should not either of them be competent when the other only is a party? The plain answer is that the legislature have seen fit to provide for the former case, and not for the latter. The idea that justice required that when *any party* to the suit was admitted *all* should be, doubtless led to this general rule affecting *parties*; but it did not induce the legislature to enact a general law removing all disabilities, nor indeed any disability, except those of parties to

the suit. But it is argued that if this be the true construction, the code has produced the absurd result of admitting a wife or husband where three disabilities exist, to wit, that of being a party, a husband or wife, and that of interest, and excluding them where but one of these disabilities exist.

This *reductio ad absurdum* would be better addressed to the legislature than to the courts, but it really has no soundness. The code does not admit a witness *with three disabilities*. It removes the disabilities themselves, in the special case for which it provides, and it admits the party without them. It has failed to remove the disability in a case for which it does not provide; and the absurdity is in arguing that because it has removed them in the case provided for, it has therefore done so in cases not provided for. The error is in supposing that the legislature, by section 399, intended to declare a general policy or rule which should allow "every person having sufficient capacity and knowledge to give his testimony in relation to any matter in controversy." Had this been the object, respect for that body leads me to believe that it would have been plainly and clearly expressed. These views might be illustrated by reference to other disabilities. A statute declares persons convicted of certain crimes incompetent to testify. Is that statute repealed? Is such a person competent to testify in all controversies because he may perhaps be called when a party to them?

But it is argued that the second exception to the general rule created by section 399, in these words, "and except also that neither husband nor wife shall be required to disclose any communication made by one to the other" operates by necessary implication to abrogate the common law rule in all cases. But this exception is merely a limitation on the general rule of the section. It does not enlarge, but restricts it. It would be a novel construction to hold that an exception which restricts the effect of a general rule, operates by implication to change other rules and create new ones, on a subject not within the provision to which it is an exception.

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The plain significancy of this exception is fully seen when it is applied to the cases created by the rule which it restricts. Thus where husband and wife are examined as witnesses because they are parties, a limitation is attached to their testimony, to wit, that "neither shall be required to disclose any communication made by the one to the other." This, in my judgment, is the whole effect of the exception.

My conclusion is that the code has not allowed a husband to use his wife as a witness in a case in which she is not a party. Perhaps, since the legislature has of late gone so far to destroy the unity of the marriage relation and change it to a special partnership, or state of legalized concubinage, it ought so to alter the law as to allow husband and wife to become each other's witnesses and to be brought in against each other, in actions like the present; but this should be done, if at all, by plain and express enactment; and such modifications of the criminal law should be made that the wife, when summoned to the witness box by the husband, should have no shield from punishment for perjury, in the legal presumption of coercion. Before such a law is passed I hope the legislature will pause to inquire whether in this respect the *ancient ways* are not best and wisest; whether the marriage relation, which is the foundation of civilized society, is likely to be preserved in its purity, by laws which permit the parties to be constrained, against each other, to disclose whatever transpires in its privacy; and to testify for or against each other under the temptation of gain or the fear of "implacable discord and dissension."

The judgment in this case should be reversed, and a new trial granted, with costs to abide the event.

[ERIE GENERAL TERM, November 17, 1862. *Marvin, Davis, Grover and Hoyt, Justices.*]

ANGEL vs. BONER and others.

When a mortgage or judgment has been once paid, and the lien discharged, the parties cannot restore the lien, to the prejudice of third persons who are then incumbrancers.

If the mortgagor can become the absolute owner, in his own right, of the bond and mortgage, the debt will be extinguished and the lien of the mortgage discharged by an unconditional assignment of the mortgage to him; and it is not in the power of the assignor and assignee, by any arrangement they may make, to restore the lien of the mortgage, so that it shall have priority over a junior mortgage.

W. borrowed money of G. and gave his bond and mortgage to secure the payment of the amount. G. demanding his money, W. procured L. to indorse his note and to raise the money for him, on being secured by the bond and mortgage, which were assigned by G. to L. for that purpose. At the maturity of the note W. applied to B. for the money, upon the security of the same bond and mortgage; informing him there were two other mortgages upon the same premises, one of which was prior and the other subsequent to the one in question. B. agreed to furnish the money, upon the terms proposed. W. then applied to L. to have the mortgage assigned to him (W.) to be by him assigned to B.; and L. accordingly assigned the same to W. to enable him to get the money, by assigning the same to B. W. thereupon assigned the mortgage to B. and obtained the money thereon, with which he paid the note indorsed by L. *Held* that under the circumstances, W. never owned the bond and mortgage, even for an instant, nor did he pay the debt secured thereby. That it was not a case of payment and satisfaction; nor a case for the application of the doctrine of *merger*. *Held, also*, that W. was merely an assignee in trust; the trust being specified by the parties, though not expressed in the written assignment, viz: that W. should raise money upon the bond and mortgage and therewith pay the note indorsed by L. And that equity would have enforced a performance of the trust.

Held, further, that by such assignment of the mortgage to W., the mortgagor, for the purpose above mentioned, the lien and priority thereof was not lost, or postponed to that of a junior mortgage.

APPEAL from a judgment entered upon the report and decision of a referee. The action was to foreclose two mortgages executed by the defendants Woodruff and wife. One, to Oliver Fairchild, dated January 28, 1848, and assigned to the plaintiff, March 15, 1859, upon which, at the date of the report, there was due \$1592.61; the other, to Jesse Angel, the plaintiff, dated March 27, 1854; amount

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due, at the date of the report, \$973.14. Another mortgage was executed by Woodruff and wife to Jesse B. Gibbs, dated March 15, 1851, upon which there was due \$1074.47. This mortgage, and the bond, were assigned to the defendant Lee, June 4, 1855, and Lee, on the 4th of October, 1855, assigned them to Woodruff the obligor and mortgagor, December 1, 1855. Each mortgage was given to secure the payment of a bond executed by the defendant, Woodruff. No question arose upon the recording of the mortgages. The defendant Boner claims priority over the mortgage executed by Jesse Angel, dated March 27, 1854. The facts and evidence out of which this claim arises are sufficiently stated in the opinion of the court. The referee rejected the claim, upon the ground that by the assignment of the bond and mortgage, under which Boner claims, to Woodruff, the obligor and mortgagor, the debt was discharged and the mortgage ceased to be a lien, and that their vitality could not be restored by the transfer to Boner.

F. E. Cornwell, for the plaintiff.

Abbott & Wilkinson, for the defendant Boner.

By the Court, MARVIN, P. J. The bond and mortgage in question were given to Gibbs for money borrowed of him by Woodruff. Gibbs wanted his money, and Woodruff made a note for the amount and procured Lee to indorse it and to raise the money; and by agreement with Lee the bond and mortgage were assigned by Gibbs to Lee, to secure him. About the time the note became due, Woodruff negotiated with Boner for the money with which to pay the note, and upon the credit of this bond and mortgage. He informed Boner of the prior and subsequent mortgages. It was arranged that Boner should let Woodruff have the money upon the terms proposed; to wit, the assignment to him of the bond and mortgage. Woodruff communicated this to

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Lee. Boner lived in another county. Woodruff inquired of Lee whether it would be right and safe to have the bond and mortgage assigned to him, and then he assign them to Boner, and Lee thought it would be. Lee made the assignment to Woodruff, October 11, 1855, and on the 1st of December, 1855, Woodruff took the bond and mortgage out to Boner, who gave him the money, \$800, and he assigned the bond and mortgage to Boner. Woodruff returned with the money, and paid the note. Previous to Lee's assigning the bond and mortgage to Woodruff the latter promised that he would take the mortgage to Boner and get the money for Lee. Lee, as a witness, says that Woodruff told him, before and at the time of the assignment to Woodruff, that he had arranged with some party in Livingston county to let him have the money, on the mortgage. Boner was the man named; there was a conversation about the method to be taken to assign the mortgage to Boner; "this was the way we hit upon to transfer the mortgage to Boner." Does not know that he gave any opinion about the propriety of the way. His intention was to have Woodruff get the money on the mortgage, from Boner.

The referee found that Woodruff, being desirous to obtain money with which to satisfy the claim of Lee under the bond and mortgage, and to obtain further time for the payment of the bond and mortgage, applied to Boner for that purpose, and that it was agreed between them that Boner should advance the money to Woodruff for that purpose, and that the bond and mortgage should be assigned to Boner as his security for the repayment of the money; that Boner advanced the money to Woodruff, and thereupon Woodruff assigned the bond and mortgage to Boner. He also found that when Woodruff took the assignment of the bond and mortgage from Lee, he was the owner in fee of the mortgaged premises, and that he intended to keep the bond and mortgage alive as a lien on the premises, and to use the same for the purpose of raising the money with which to pay Lee;

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and that the money received from Boner was paid by Woodruff for the use of Lee.

As a conclusion of law, the referee found that by reason of the assignment of the bond and mortgage to Woodruff, the obligor and mortgagor, the debt, and the lien of the mortgage, became and were satisfied and discharged, as against the interests and lien of the plaintiff in this action. To this conclusion the defendant Boner excepted. The referee directed judgment for the plaintiff for the amount of his two mortgages, and that out of the surplus, if any, Boner's mortgage should be paid; and to this Boner excepted.

The referee has not found, as the evidence clearly shows, that the consideration was paid by Woodruff to Lee, for the assignment of the bond and mortgage by the latter to the former; nor has he found for what purpose and upon what understanding such assignment was made. He has simply found the fact of the assignment, and then the arrangement between Woodruff and Boner, and the assignment by the former to the latter, and that the money which Woodruff received from Boner was by him paid for the use of the defendant Lee.

The learned referee, in his opinion, discusses the doctrine of *merger* (which had been pressed upon him by counsel) as having no application to the case, and then puts his decision upon the ground that "when Woodruff, the debtor, became, as he did in this case, the assignee of the bond debt against himself, the personal action was entirely suspended and therefore gone; and with it went the mortgage lien. The doctrine of non-merger would not help the matter, for it did not apply to this case, and I take it equity does not intend to extend this rule." This extract from the opinion of the referee, and his reference to *Marvin v. Vedder*, (5 Cowen, 471,) put us in possession of the views of the learned referee; and it seems to me that they are quite too narrow and restricted for the case. I agree that in case Woodruff can

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become the absolute owner, in his own right, of the bond and mortgage, the debt was extinguished and the lien of the mortgage was discharged; and that it was not in the power of Woodruff and Boner, by any arrangement they should make, to restore the lien of the mortgage, so that it should have priority over Angel's junior mortgage. Where a mortgage or judgment debt has been once paid, and the lien discharged, the parties cannot restore the lien, to the prejudice of third persons who are then incumbrancers. Such was the case of *Marvin v. Vedder*. It was a case of actual payment, as the court held, made by the mortgagor to the mortgagee; and a few days thereafter the money was handed back by the mortgagee to the mortgagor, with an understanding that the time of payment should be extended, and the mortgage security should remain as though the money had not been received by the mortgagee.

The present case, briefly stated, is: Woodruff loaned money of Gibbs and gave his bond and mortgage for the amount. Gibbs wanted his money, and Woodruff procured Lee to indorse his note and to raise the money for him, upon being secured by the bond and mortgage, which was assigned by Gibbs to Lee, for that purpose. About the time the note became due, Woodruff applied to Boner for the money, upon the security of the same bond and mortgage. He informed Boner of the other mortgages, and that one of them was junior to this mortgage. Boner agreed that he would, at a future day, furnish the money, upon the terms proposed; and thereupon Woodruff informed Lee of what could be done with Boner. Lee was then the owner and possessor of the mortgage. Boner resided in another county. Woodruff asked Lee if it would be safe—if it would be all right to have the mortgage assigned to him, Woodruff, and be by him assigned to Boner. Lee thought it would be perfectly right and safe, and he assigned it to Woodruff, to enable him to get the money. Or, in the language of Lee, there

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was a conversation about the method to be taken to assign the mortgage to Boner, and it resulted in his assigning it to "Woodruff to assign to Boner. This was the way we hit upon to transfer the mortgage to Boner." Woodruff did procure from Boner the money, and assigned to him the mortgage. Boner had no doubt he was obtaining a valid security. Under these circumstances, can it be claimed that Woodruff ever owned the bond and mortgage? That he ever paid the debt secured by them? Suppose he had not obtained the money from Boner, and Lee had been compelled to pay the note he had indorsed for Woodruff; would not a court of equity have compelled Woodruff to reassign the mortgage to Lee, and would it not have declared the mortgage lien still in force, not only as against Woodruff, but as to Angel's junior mortgage? I think so. Lee understood that Woodruff had no money, and that he must raise it upon the credit of the mortgage. And having confidence in him he made the assignment of the mortgage to him to enable him to raise the money upon it by assigning the same to Boner. Woodruff may be regarded as Lee's agent, in procuring the money. It is true that Woodruff was all the while the principal debtor, and Lee was his surety; but he held the bond and mortgage for his security, and he had no idea of parting with them, except in a manner which should result in his discharge from liability. He did not give up the bond and mortgage to Woodruff and take his personal promise that he would pay the note. Such was not the character of the trust he reposed in Woodruff, but he made "the assignment to Woodruff to assign to Boner," upon Boner's advancing the money to pay the note; and he entrusted Woodruff to do the business.

In my opinion there was no instant of time when Woodruff was the owner of the bond and mortgage. It is not a case of payment or satisfaction. It is not a case for the application of the doctrine of *merger*. Woodruff was assignee

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in trust. The trust upon which, or the purpose for which, the assignment was made to him was specified by the parties, though not expressed in the written assignment. Equity would have enforced a performance of the trust. The trust was that Woodruff should raise money upon the bond and mortgage and therewith pay the note indorsed by Lee.

One person delivers money or property to another, to be by the latter paid or delivered to a third person. In such a case the party receiving the money or property holds it upon a trust, and this trust, when not expressed, is implied from the very nature of the transaction, though no express agreement has been entered into to that effect. Such trust, if the beneficiary named has no interest in it, or does not consent to avail himself of it, may be revoked, and then the original trust is gone, and an implied trust results in favor of the party who created the original trust. (*Story's Eq.* § 1196.) Equity will compel the performance of such trust. (*See Story's Eq.* § 1041 *et seq.*)

At common law, a trustee, by appointing his debtor his executor, extinguished the debt, and it could not be revived; but in equity the debt is not extinguished. (*Story's Eq.* § 1209.) At common law, a debt due by an administrator was not extinguished, but it was suspended.

In one of these cases the legal title to the debt was in the executor, (in the absence of a specific legacy,) and in the other, in the administrator. And yet there is no merger, or, in equity, extinguishment of the debt. The title to the debt is held in *autre droit*, and in such a case the doctrine of merger does not apply. (*See Clift v. White*, 2 Kernan, 519, and cases cited.) The executor or administrator could not institute an action against himself, but the party entitled to the surplus of the estate could maintain his suit, in equity.

In my opinion the judgment should be reversed, and there should be a new trial, unless the plaintiff shall stipulate that

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the judgment be so amended as to give priority to Boner's mortgage over the plaintiff's junior mortgage. Costs to abide the event.

[ERIE GENERAL TERM, November 17, 1862. *Martin, Davis, Grover and Hoyt*, Justices.]

DAUBER vs. BLACKNEY.

Where the holder of a note made by a third person turns it out in payment of his own debt, or in payment for property purchased, or for money received by him, from the person to whom he transfers it, and at the same time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking, in substance, entirely for his own benefit and advantage, and the contract is valid even though it rest entirely in parol; and is not within the statute of frauds.

And if valid by parol, such an undertaking will be none the less valid because reduced to writing, without expressing the consideration.

THIS was an appeal by the plaintiff from a judgment of a county court, reversing a justice's judgment in favor of the plaintiff.

C. C. Torrance, for the appellant.

Wm. Woodbury, for the respondent.

By the Court, HORT, J. The plaintiff, in his complaint before the justice, alleged that the defendant was indebted to one Ira Whitcomb in the sum of fifty dollars, for a buggy sold and delivered to the defendant, in June, 1855, and that before the commencement of the action the demand, account and cause of action was assigned to the plaintiff, and that the same had not been paid, &c. The defendant interposed a general denial, and an allegation of payment. On the trial

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it was proved that the defendant, on the 15th of October, 1855, applied to said Ira Whitcomb to purchase a buggy. Whitcomb asked \$80 for the buggy. The defendant then held a note against Nelson and Orville Bishop, of which the following is a copy :

"Gowanda, June 19, 1855.

\$50. By the first day of January next, for value received, I promise to pay Philip Davis or bearer fifty dollars and use.

NELSON BISHOP.

ORVILLE BISHOP."

The defendant wanted to turn out this note, towards the purchase price, and wrote the following guaranty on the back of it : "I hereby guarantee the collection of the within note. Oct. 15, 1855. Seley Blackney."

Whitcomb told him he would not take the note, unless he would make it good. The defendant hesitated some time, and Whitcomb told him he would not take it unless he would do it. He said he would do it, and did. After he signed the guaranty Whitcomb took the note, and let him have the buggy. The balance the defendant was to pay in money, which he paid in a short time. About the 1st of December, 1855, Whitcomb sold the note and guaranty to the plaintiff. The note not being paid, when due, the plaintiff, in the month of January, 1856, commenced an action thereon, against the makers. The summons was served on one of the defendants on the 24th of January, and on the other defendant on the 6th of March, 1856. Judgment was perfected on the 31st day of March, and an execution was issued thereon on the 16th of April, 1856, which was subsequently returned unsatisfied.

Subsequent to the transfer of the note to the plaintiff, Whitcomb gave him a written assignment of any and all claim, demand, cause and causes of action he had against Blackney, for the buggy sold to him, and on account of his guaranty of the note made by the Bishops.

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I think it sufficiently appears by the case that the plaintiff had used due diligence to collect the note in question, of the makers. In the case of *Brown v. Curtiss*, (2 N. Y. Rep. 225,) the plaintiff had a note against the defendant, for borrowed money. The defendant, in exchange therefor, transferred to the plaintiff a note against one G. F. Brown, and executed the following guaranty upon the back thereof: "I guarantee the payment of the within." The court of appeals held that although the guaranty was in form a promise to answer for the debt of another, it was still in substance an engagement to pay the guarantor's own debt in a particular way, and would be good without any writing. And it was held that the statute of frauds did not apply to such a case; that the guarantor did not undertake as a mere surety for the maker, but on his own account, and for a consideration which had its root in a transaction entirely distinct from the liability of the maker.

The case of *Wood v. Wheelock*, (25 Barb. 625,) decided by this court, is much relied on as an authority against the right to recover in this case. And if the decision in that case can be sustained, consistently with the cases in the court of appeals, I shall be free to concede the plaintiff cannot recover in this action. In that case it was shown that the defendant sold to the plaintiff a note against one Anderson, received the money therefor, and indorsed on the back thereof this guaranty: "I guarantee the payment of the within note. Sylvester Wheelock." That cause was tried before me, as a referee, and supposing it to come within the principle and class of cases sanctioned and approved in *Brown v. Curtiss*, a report was made in favor of the plaintiff, and the judgment was reversed by the general term of this court. Justice Greene, who delivered the opinion in the supreme court, said that he could see no difference, in principle, between that case and the case of *Spicer v. Norton*, (13 Barb. 542.) He says the facts of that case were that Spicer, the plaintiff, sold to the defendant a note made by one Lawton, for \$500.

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The defendant paid for this note, in part, by a note for \$117.34 made by one Gleason. At the same time the defendant gave to the plaintiff a written agreement, reciting the transfer of the Gleason note to the plaintiff, and stating that he, the defendant, held himself accountable for the payment thereof *on condition* that the plaintiff used proper exertions to collect the same. The action was brought on this agreement, and the supreme court held that the agreement was within the statute of frauds, and gave judgment for the defendant, and the judgment was affirmed by the court of appeals. I agree that that case was in substance and in principle like the one now under consideration, so far as the statute of frauds is concerned. But it by no means follows that the court of appeals in that case held that the agreement was within the statute of frauds, from the simple fact that the judgment was affirmed by that court. It is perfectly apparent that the guaranty in that case was a guaranty of collection; and no proceedings whatever had been taken for the collection of the note, of the maker; and that point was distinctly made on the trial. The plaintiff was nonsuited, and the judgment was affirmed in the supreme court and in the court of appeals. It is true the supreme court held the guaranty to be within the statute of frauds; and it is equally clear that if the court of appeals had come to a different conclusion, the judgment must still have been affirmed, for the reason that the contract was a guaranty of collection, and no steps had been taken to collect it of the maker. The decision in that case has not, as I have been able to discover, been reported, in the court of appeals; and without the opinions, we have no means of determining on which ground the court proceeded.

In the case of *Durham v. Manrow*, (2 Comst. 535,) C. P. Durham, one of the defendants, was the holder of a note made payable to himself or bearer, executed by Ephraim Durham. C. P. Durham purchased a horse of the plaintiff, and transferred to him the note. He, with the other defend-

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ant, at his request, executed a joint guaranty of its payment, not expressing any consideration. This guaranty was, by a vote of four to three of the judges of the court of appeals, held not to be within the statute of frauds, and therefore valid. Judges Strong, Ruggles, Cady and Shankland voting in favor of its validity, and Jewett, Gardiner and Hoyt against it; the latter on the ground stated by Jewett, J. in his opinion—that at all events the defendant Moulthrop was a mere surety for his co-guarantor, and no consideration being stated in the instrument, that it was void by the statute of frauds, as to him, and a joint action could not be sustained against him and Durham, under the former system of pleading. Bronson, J. did not hear the argument, and therefore took no part in the decision.

In the case of *Hall v. Farmer*, (2 Comst. 553,) Kathern & Doolittle having unsettled accounts with the plaintiff, at the date of the note in question, settled with Hall, and adjusted the amount due, and made a note for the balance found due, payable to the order of H. W. Doolittle and John Farmer, for the balance of such indebtedness, and procured the defendants Farmer and H. W. Doolittle to sign a joint guaranty of its payment, not expressing any consideration therefor. The note, on its face, was payable immediately. Jewett, Gardiner and Hoyt, judges, held that the guarantors were clearly mere sureties for the makers of the note, and as no consideration was expressed in the guaranty, it was within the statute of frauds and therefore void. Shankland, J. concurred with them in the result, but on the ground that there was in fact no consideration for the guaranty, as no new consideration passed between the parties, and there was no extension of the term of credit. Bronson, J. not having heard that case, took no part in its decision.

The next case in order, in the court of appeals, is that of *Brewster v. Silence*, (4 Seld. 207.) In that case John Thompson sold to George Silence a pair of horses, in payment for which, Silence made his note, payable the first day

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of November next after the date thereof, to the order of John Thompson, for \$140, and procured F. Silence to sign a guaranty upon the note, as follows: "I hereby guarantee the payment of the above note, (signed) F. Silence," and delivered the same to Thompson, in payment for the horses. This was held by the court of appeals, and very properly, to be a guaranty within the statute. F. Silence in fact as well as in form signed the guaranty as a mere surety for George Silence, on a note made by him to and payable to the order of Thompson. It was clearly a special promise to pay or become liable for the payment of the debt of G. Silence, and not a promise to pay a debt of his own, or for property purchased by himself, or for the repayment of money had by him from the party to whom the guaranty was made or delivered. This case is not, nor is the case of *Hall v. Farmer*, in conflict with the principle described in *Brown v. Curtis*.

The case of *Noel v. Murray*, (3 Kern. 168,) to which we are referred, is in no way applicable to the present case: There the defendant purchased property, for which he paid part cash, and for the residue he gave a note of a third party, taking a bill of purchase, and a receipt in full, without any agreement, either written or verbal, that the note should or would be paid. Whereas in the present case it *was* not only verbally agreed that the defendant should make the note he was transferring good, but also executed a written instrument guarantying its collection, but without expressing the consideration therefor; showing clearly that the note was not taken or intended to be taken in absolute payment of the property purchased by the defendant. And if the case does not fall within the statute of frauds, then it is quite clear that the defendant can be made liable either for the goods purchased by him, or upon the guaranty, upon the plaintiff's showing that the conditions upon which he was to become liable to pay have been complied with; which is to show that the makers were not good, and that the money could not be

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collected on judgment and execution against them; so that the question of the plaintiff's right to recover would seem to depend entirely upon whether the transaction and agreement between Whitcomb and the defendant was within the statute of frauds.

The case of *Draper v. Snow* (20 N. Y. Rep. 331) was held to be identical with the case of *Brewster v. Silence*, (4 Seld. 207;) and on the authority and reasoning of that case the guaranty was held to be within the statute and void, because it did not state the consideration expressed. Still, Judge Selden, who delivered the opinion of the court in the case, does not attempt to question the decision of *Brown v. Curtis*. On the contrary, he says: That case was put, not upon the ground that the statute had been complied with, but that the contract did not come within the provisions of the statute, and need not have been in writing at all.

In *Church v. Brown*, (21 N. Y. Rep. 315,) the action was upon a guaranty in the following form: "I will be responsible for all such goods as Mr. White shall buy of Messrs. Church within one year from date, and which shall not be paid for according to the terms of the within contract." This guaranty was signed by the defendant, and indorsed upon a written contract between the plaintiff and White, by which the plaintiffs agreed, during one year, to sell White such articles of hardware from their store as he might desire, upon a credit of one year, with interest after six months from the time of purchase. A majority of the court of appeals very properly held that it sufficiently appeared from the terms of the guaranty that the sale and delivery of the goods by the plaintiffs to White, according to the terms of the contract on which the guaranty was written, was the consideration and a sufficient consideration, for the guaranty. The principle decided in *Brown v. Curtiss* is in no way questioned in that case. On the contrary, Wright, J. seems to treat that case as properly holding that the contract was in form a promise to answer for the debt or default of an-

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other, and was to be so construed and treated, unless it be shown by parol proof that in substance it was an undertaking by the guarantor, for his own benefit, and upon a full consideration received by himself.

In *Cardell, executor dec. v. McNeil*, (21 N. Y. Rep. 336,) the action was on a verbal undertaking that a chattel note was good and collectable, which had been delivered by the defendant to the plaintiff in part payment for a horse, by which the maker, one Cornell, promised to pay \$125 in a top buggy worth that amount; to be paid on the 29th of June following the date thereof, which was May 5, 1854, and that the same should be paid when due. The court held that the warranty was not within the statute of frauds. That the undertaking by parol being valid, it was not waived by the plaintiff's acceptance of the note without any written guaranty. Judge Comstock, in delivering the opinion of the court, after holding that it was to be deemed a guaranty of payment instead of collection, says: "It is claimed that the guaranty is void by the statute of frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But looking at the substance of the transaction, we see that the defendant paid in this manner a part of the price of a horse sold to himself. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him and thereby discharge him." He further says: "The question at this time hardly claims a discussion, because it was in effect decided by this court, upon the fullest consideration, in *Brown v. Curtin*. The contract in that case was held valid, by the unanimous decision of the court."

It would seem that this decision should place the question at rest, that wherever the holder of a note against a third person turns it out in payment of his own debt, or in payment of property purchased, or for money received, by him, from the person to whom he transfers it, and at the same

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time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking, in substance, entirely for his own benefit and advantage, and the contract is valid although it rest entirely in parol, and is not within the statute of frauds. Of course if valid by parol, it would be none the less valid because reduced to writing expressing the consideration. If the contract is not within the statute of frauds, the consideration may clearly be shown, to uphold it, although it is not expressed therein. The only possible difference which can exist between that case and the one under consideration, so far as the statute of frauds is concerned, is that in that case it was a guaranty of payment, and in this a guaranty of collection, and that the note in that case was payable in chattels, and in this case it is payable in money. But I cannot conceive that the cases are different in principle. In the one case the defendant agreed that his vendor should be paid for the property purchased by the maker of the note, in a buggy, when the note should become due; while, in the case under consideration, the defendant agreed that his vendor should receive the purchase price of the property sold him, on a due prosecution to judgment and execution, of the maker of the note in question.

It was strenuously contended by the defendant, that inasmuch as Whitcomb had, in the first instance, transferred to the plaintiff the note and guaranty without any understanding as to their collection, and without having then assigned any claim for the buggy sold to the defendant, it operated as an extinguishment of any claim which Whitcomb might have had against the defendant, to recover the balance due for the buggy sold and delivered. But we do not see how this view of the subject can be maintained. If we are right in holding that this guaranty was not within the statute of frauds, the plaintiff, by the first transfer, had a valid claim against the defendant; and by the subsequent transfer of the cause of action for the buggy sold and upon the guar-

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anty, he became invested with either remedy, and we think might maintain an action for the portion of the purchase money remaining in fact unpaid; especially if he offered to surrender to the defendant the note and his written guaranty. This was in effect done by executing and tendering to the defendant an assignment of the judgment he had recovered against the makers of the note, and interest. If we are right in the construction we have given to this guaranty, the plaintiff, on the proofs in the case, would have been entitled to recover thereon not only the amount of the note but the costs made by him in prosecuting the same against the maker. But he only sought to recover, before the justice, the amount of the note and interest, and that is all he did recover. The evidence entitling the plaintiff to recover was uncontroverted, and the facts proved and undisputed fully entitled the plaintiff to recover.

I have not attempted to discuss the innumerable objections raised by the defendant's counsel, on the trial. In fact they are too numerous, and most of them too frivolous, to warrant a reference to them in an opinion. Scarcely a question was put, during the whole trial, but that some kind of objection was raised. Some of them may have been objectionable in point of form, or as immaterial; but as there appears to be no controversy about the main and principal facts in the case, which are properly proved and which entitle the plaintiff to recover, we have not very closely criticised and do not propose to discuss the objections which could not affect the plaintiff's right to recover.

We think the judgment of the justice was right, and fully sustained by the evidence.

The judgment of the county court must therefore be reversed, and that of the justice affirmed.

[ERIE GENERAL TERM, November 17, 1862. *Marvin, Davis, Grover and Hoyt, Justices.*]

THOMPSON *vs.* CULVER.

A motion to set aside an attachment may be made after judgment has been entered.

Even if such a motion could not be made after judgment, yet if a motion is noticed and actually made in time, but a final hearing and decision thereon is delayed by a reference, until after the entry of the judgment, the order may then be entered.

THIS was an appeal from an order made at a special term, denying a motion made by the defendant to set aside the attachment issued by the plaintiff. The attachment was issued on the ground that the defendant had absconded, or kept himself concealed, to avoid the service of civil process.

The attachment was issued on the 12th of February, 1862, and was served on the 14th of February. On the 12th of March following, an order was granted to show cause, on the 25th of the same month, why the attachment should not be vacated. The facts involved in the hearing of the motion, on the order to show cause, were referred to a referee to hear and report the evidence with his opinion thereon. The hearing was had on the 21st of April, 1862. The referee reported the evidence with his opinion, substantially, that the facts did not sustain the attachment. The defendant sought to have the time extended for entering judgment till after the decision of the motion to set aside the attachment, but ultimately failed, and judgment was perfected against him, on the 10th of April, 1862. On the 10th of May the sheriff sold the attached property on the execution issued upon the judgment.

W. Fullerton, for the appellant.

G. Dean, for the respondent.

By the Court, PECKHAM, J. Two points are made by the plaintiff against the motion. First, that it occurs too late—a judgment having been perfected prior to the hearing of the

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motion; second, that the defendant did in fact keep himself concealed, with intent, &c.

As to the first point. If the position be sound, that such a motion cannot be made after judgment, yet this motion having been noticed and actually made, confessedly, in time, the extension of time caused by the reference will not make it irregular, though the hearing be not completed till after judgment.

But in my opinion it is not indispensably necessary that the motion should be made before judgment. A very learned and respectable court has declared that the attachment is discharged, *ipso facto*, by the entry of the judgment. But I can find no provision in the code to that effect. On the contrary, there are provisions entirely inconsistent with such a position. Among other provisions, the statute declares that "until the judgment against the defendant shall be paid"—not recovered—but until it "shall be paid," the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and apply the proceeds thereof to the payment of the judgment." (*Code*, § 237, *subd.* 4.)

It is clear that the sheriff has no such power under the execution. He has it, obviously, under the attachment, which therefore cannot be said to be superseded by the judgment.

The facts, as disclosed by the affidavits and the evidence before the referee, show that there was no ground for the attachment. The order appealed from should therefore be reversed, and the attachment discharged, with \$10 costs.

[NEW YORK GENERAL TERM, November 18, 1862. *Ingraham, Peckham and Leonard, Justices.*]

SARSFIELD *vs.* VAN VAUGHNER and GREER.

The constitution of 1846 and the code of procedure have by necessary implication abolished every limitation in respect to the amount in controversy theretofore required to give jurisdiction, in actions of an equitable nature entertained only in the court of chancery.

The act of 1862, repealing the section of the revised statutes which required the court of chancery to dismiss every suit involving less than \$100, did not revive any former rule; because the code had previously repealed that section of the revised statutes, and abolished every other rule limiting the jurisdiction of the supreme court.

Yet where the amount in controversy is less than \$100, this may affect the question of costs.

APPEAL from an order made at a special term, dismissing the plaintiff's complaint. The action was in the nature of a creditor's bill, founded on a judgment against the defendant Van Vaughner, for \$88.83, on which there remained due only \$31.02. Van Vaughner moved to dismiss the complaint, on the ground that the sum involved was too small to occupy the attention of the court.

R. H. Shannon, for the appellant.

Ira O. Miller, for the respondent.

By the Court, LEONARD, J. The constitution of 1846, and the code of procedure, have by necessary implication abolished every limitation in respect to the amount in controversy theretofore required to give jurisdiction, in actions of an equitable nature, formerly entertained only in the court of chancery. (*Giles v. Lyon*, 4 *N. Y. Rep.* 600. *Cobine v. St. John*, 12 *How. Pr. Rep.* 333. *Coon v. Brook*, 21 *Barb.* 546. *Mallory v. Norton*, *Id.* 436.)

No rule was revived by the repeal of section 37, article second, title second, chapter first, part third of the revised statutes, in relation to the jurisdiction of the court of chancery, by the act of 1862; (*Laws of 1862*, p. 859, ch. 460,

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§ 39;) because the code had previously repealed that statute, and abolished every other rule limiting the jurisdiction of the supreme court.

The question of costs may be affected, where the amount in controversy is under \$50.

The order appealed from should be reversed, but without costs.

[NEW YORK GENERAL TERM, November 24, 1862. *Ingraham, Leonard and Barnard*, Justices.]

SHOTWELL vs. MALI and others.

It is well settled that an exception to the refusal of the court to dismiss the complaint cannot be sustained on account of the deficiency of any proof that might have been supplied upon the trial, had the attention of the court and of the opposite party been called thereto.

The officers of a corporation, authorized to issue certificates to the stockholders, as evidence of title to stock, are liable not only to the immediate purchasers from them of spurious stock, falsely and fraudulently certified by them, but to any subsequent purchaser buying upon the faith of the false certificate, and sustaining damage thereby.

Although the purchaser of spurious stock has a remedy against his vendor, for a breach of the implied warranty of title, that right of action does not constitute a bar to an action against one who has induced the purchase, by a fraudulent representation that the vendor had title to the stock, where damage has resulted from the fraud.

The purchaser's right of action against the officers of a corporation concerned in issuing certificates of spurious stock is complete upon the purchase. And that right will not be affected by any subsequent action of the directors of the corporation, in turning out other property to him, to an amount exceeding the sum paid by him for the false certificates.

Any one furnishing another with a false and fraudulent document purporting to show title in the latter to any property, is liable to any person sustaining damage in consequence of reposing confidence therein. *Per GROVER, J.*

The case of *Cazeaux v. Mali*, (25 Barb. 578,) approved.

THE complaint in this action stated that the plaintiff was the owner of four hundred and eighty shares of the capital

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stock of the Parker Vein Coal Company. That the said Parker Vein Coal Company was a corporation created under the laws of the state of Maryland, by an act of the general assembly of said state, passed February 2d, 1850, and exists under said act, and several acts amendatory thereto. That said corporation was created for the purpose of working mines of coal and iron, and for vending the products of the same. That by its act of incorporation, it was provided that the concerns of said corporation should be managed by a president, who should be a director, and four other directors, to be chosen annually by the stockholders, and to serve for the term of one year, and until others should be chosen, and that a majority of said directors should constitute a quorum for the transaction of business. That by the said act of incorporation, the said corporation was empowered to hold and possess real and personal property to the amount of five hundred thousand dollars; and further, it was by said act provided, that the capital stock of said corporation, whether the same should be real or personal, or both, should amount to the sum of five hundred thousand dollars, which should be divided into shares of one hundred dollars each. That by a subsequent act of said general assembly of Maryland, passed on or about the eleventh day of February, 1853, amendatory to said act of incorporation, the said Parker Vein Coal Company was allowed and authorized to increase the capital stock of said company to an amount not exceeding three millions of dollars, to be divided into shares of one hundred dollars each, and was further empowered, by said last mentioned act, to hold not exceeding seven thousand acres of land. And further, that the president and directors of said company were authorized to receive subscriptions to the said additional capital stock, at such times and places as they, or a majority of them, might designate. That said Parker Vein Coal Company was duly organized in pursuance of said act of incorporation with a capital of five hundred thousand dollars, divided into shares of one hundred dollars each,

and that subsequently, and in pursuance of said amendatory act of February, 1853, the capital stock of said company was increased to the amount of \$3,000,000 divided into shares of \$100 each. That said company became and were possessed of a large and valuable property, consisting of lands and mines of coal and iron, and extensive apparatus and implements for carrying on mining operations, and of a large number of steamships, and of other property, which said property, real and personal, was, in the aggregate, of the value of \$3,000,000, or over. That said company, before and at the time of the committing of the wrongful and fraudulent acts of the defendants thereafter mentioned, was in a flourishing and prosperous condition, and the stock of said company was intrinsically of par value, and the market price of the same was par, or nearly so, and but for said wrongful and fraudulent acts of the defendants thereafter mentioned, the stock would have continued to be of the full par value, and the market price or value thereof would have been and continued to be of the full par value. That on or about the 15th day of June, 1853, Hippolyte Mali, Otis P. Jewett, and James G. Stacey, the defendants in this action, were (with others) duly elected and became directors of said Parker Vein Coal Company, and acted as such. That said Hippolyte Mali was duly made and became president of said company, and said Otis P. Jewett vice president thereof, and said James G. Stacey treasurer thereof, and they thereupon respectively, and about the date last aforesaid, entered upon the duties of said respective offices, and acted as such officers, and that as such directors and officers, the defendants, Mali, Jewett and Stacey, were intrusted with, and had the principal control and management of the property and affairs of said company. That the principal office of the said company was in the city of New York, (where the said defendants resided,) at which office the affairs of the said company were principally managed, directed, and controlled. That the plaintiff became the owner of said four hundred and eighty shares of the capital stock of

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said company, by purchase at several dates and times between the 1st day of August, 1853, and the 2d day of June, 1854, inclusive, and still owns and holds the same. That when the plaintiff purchased said stock, the corporation owned and were possessed of property of the value of at least \$3,000,000, and sufficient to make the capital stock of said company of full par value. That said Mali, Jewett and Stacey, while they were such directors and officers of the said corporation, and previous to the said 1st day of June, 1854, and while acting as such officers and managers of the company, not regarding their duty in their said offices, but misconducting themselves therein, did fraudulently, willfully and corruptly issue what purported to be shares of the capital stock of the Parker Vein Coal Company, to the amount of one hundred and twenty-eight thousand shares, or thereabouts, over and above and in addition to what said company were authorized by law to issue, and sold and disposed of the said shares of stock, or which purported to be such stock so over issued by them, and realized from the sales thereof large sums of money, amounting in the whole to about \$1,300,000, which said sum of money the defendants fraudulently misapplied and appropriated to their own use. That the certificates of the shares of such stock so over issued by the defendants were, in form and appearance, similar in all respects to the certificates of shares of the legitimate stock of said company, and that by reason of said wrongful and fraudulent over issue and sale by the defendants, of such large amounts of what purported to be stock of said company, the genuine and legitimate stock of said company was depreciated in price and value, and was thereby rendered and became valueless and unsalable in the market. That by reason and in consequence of said wrongful and fraudulent acts and misconduct of the defendants in the premises, and the said fraudulent over issue, sale and disposition by the defendants as aforesaid, of what purported to be stock of said company, the said shares of stock of the company so purchased and held by the

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plaintiff as aforesaid had been rendered wholly unsalable and valueless, and lost to the plaintiff, whereby he had sustained loss and damage by reason of the premises to the amount of \$30,000.

Second. And the plaintiff, for a further cause of action against the defendants, alleged that at several dates between the first day of August, 1853, and the second day of June, 1854, inclusive, the plaintiff became the owner, by purchase, of certain other four hundred and eighty shares of the capital stock of the said Parker Vein Coal Company, and that at the time and times of the purchase of said shares of stock, the defendants made false and fraudulent representations respecting the character and value of the said stock and the then position of the company, representing and alleging that the affairs of the said company were in a good and prosperous condition, and wholly withholding and concealing from the plaintiff the fact that they, the defendants, had theretofore issued and had been, and were then from time to time, issuing large amounts of what purported to be the capital stock of said company, beyond the amount of stock which said company were by law authorized to issue, and made such false and fraudulent representations for the purpose of influencing and inducing various parties, and particularly the plaintiff, to purchase largely of the said stock, and that the plaintiff was influenced thereby in the making of such purchase of stock as aforesaid. That, at the times of making such purchases, the plaintiff had no knowledge or information of any over issue of such stock. That by reason and in consequence of such fraudulent over issue of what purported to be the stock of said company, the shares of the stock of the company have been rendered and become wholly valueless and lost to the plaintiff, and that he had sustained damages thereby and by reason of such false and fraudulent representations made by the defendants, to the amount of \$30,000.

Third. And the plaintiff, for a further cause of action against the defendants alleged that the said Parker Vein

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Coal Company being an incorporation as aforesaid, and the defendants being officers thereof as aforesaid, the defendants, at several dates and times previous to, and from and between the said 1st day of August, 1853, and the 2d day of June, 1854, and subsequently thereto, and after the whole amount of the capital stock of said company had been issued, did make and issue certain false and fraudulent certificates purporting to be certificates of shares of the capital stock of said Parker Vein Coal Company, which said false and fraudulent certificates and shares the defendants, at the dates and times aforesaid, sold and disposed of, and realized therefrom large sums of money. That such certificates were, in form and appearance, identical with the certificates which had been issued for the true and legitimate stock of said company. That the plaintiff, believing such false and fraudulent certificates to be certificates of the true and legitimate stock of said company, purchased what purported to be four hundred and eighty shares of the stock of the company, and the same were duly transferred to the plaintiff, and for which the plaintiff paid large sums of money. That said four hundred and eighty shares so purchased by him as last aforesaid, were soon afterwards ascertained and found to be spurious, and to have been illegally and fraudulently issued, whereby the plaintiff sustained damages amounting to the sum of \$30,000. Wherefore the plaintiff demanded judgment against the defendants for the sum of \$30,000, besides costs.

The defendants Mali and Jewett answered separately. Mali, in his answer, put in issue most of the allegations of the complaint. He denied that he, with the other defendants, or at all, issued stock of the said company beyond the amount of the capital stock, except that while he was the president of the company, and for a long time prior thereto, it was and had been the usage and practice of that company, and of other stock companies having transfer offices in the city of New York, in the customary course, and for the convenience of their business, to keep certificates of the stock of

such company and companies signed by the proper officers in blank, to be filled up from time to time, as old certificates might be surrendered and new certificates issued, in the course of alienation and transfer by stockholders of their shares of stock, and that the like usage and practice existed in the office and in respect of the stock certificates of the said Parker Vein Coal Company during all the time this defendant was such president; and that, in pursuance of such usage, he signed numerous certificates of such stock, in blank, in the ordinary course of the business of the company, and left the same in the office of said company with the other papers and books of the company, in charge of its officers, to be used for the lawful purpose of transfer, and in the due and ordinary course of transfer of stock and not otherwise; that it was no part of his duty as such president to attend personally to the making of transfers of stock and to the issuing of certificates thereof; that he did not, in fact, make any such transfers, or issue any of such certificates, and that if any of the certificates signed by him were issued otherwise than by the said company, and in and for its lawful business, it was without his knowledge, and contrary to the intention with which he so signed and left them; and he denied all fraud and wrong in respect thereof, alleged against him in the complaint. And he denied that he, in conjunction with the other defendants, or otherwise, issued, received, or sold any of said certificates, or any stock of said company, or received or applied to his or their own use the whole or any part of the proceeds of such issue or sale, or that he in any way participated in such issue, sale, or proceeds, except as above specified; and he denied all the allegations in respect thereof, in the complaint.

The defendant Jewett, by his answer, also denied most of the allegations of the complaint. He denied that he issued the stock of said company beyond the capital thereof, or the amount thereof allowed by law, or sold the same, or applied the proceeds thereof otherwise than as hereinafter stated. That before any of said stock was ever issued, the said com-

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pany was indebted to him for money loaned to it by him, and used in paying for real estate and for improvements thereon, and in building and in purchasing steam ships, and otherwise in and about its business, to the amount of about \$225,000. That obligations of the company to a large amount, held by various parties, were about maturing, which the company had not the present cash or convertible means to meet, and that in order to pay such obligations at maturity, and to save its credit, and in order to prevent great and ruinous sacrifices of its property and interests, it became necessary to raise and provide large sums of money. That in order to meet such necessity, the defendant Stacey, the treasurer of the company, by order of said company, transferred or issued to this defendant, at different dates and in different amounts, the stock issued by said company beyond the amount of its capital stock. That this defendant pledged portions of such issue to secure temporary loans made to him, and used by him for the said purposes. That when such loans matured it became necessary to pay the same, and to raise further sums owing by said company, and maturing as aforesaid, and defendant would then pledge other and larger portions of such over issued stock, and used the moneys received therefor or thereon in like manner. That all the over issued stock was so used, and all the moneys received thereon were so applied for the use and benefit of the said company, and not otherwise. That all the stock so over issued was about 127,000 shares, and the entire net proceeds received therefor was about \$418,000. That the moneys so received from and on account of such over issued stock, and other moneys belonging to the defendant, and lent by him to the company, and used by it about the business of the said company at or about the time such over issues were being made, amounted (over and above the first mentioned sum lent by this defendant to said company) to about the sum of \$585,000. That after charging this defendant with the net proceeds of said over issued stock, and all other moneys re-

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ceived by him from or on account of the said company, the company was indebted to him, about the 1st day of July, 1854, in about the sum of \$250,000, and that the company is now indebted to him in that sum, with the interest which has since accrued thereon.

The defendant Stacey did not answer. The action was tried at the New York circuit, in October, 1860, before the Hon. W. F. ALLEN and a jury. At the close of the plaintiff's testimony the defendants' counsel moved to dismiss the complaint. The court decided that the case should go to the jury on the question whether the stock was spurious. There was evidence of these certificates bearing date, and being issued by the company after the stock was full, and over issues had commenced. In the absence of evidence that these were given on the surrender of stock, it was for the jury to say whether they were genuine or not. The defendants excepted.

The counsel for the defendants offered to examine the plaintiff as to his connection with the American Coal Company, to prove that the plaintiff voted on all his stock for the appointment and election of a new set of directors, in the summer of 1854; that those directors, with his consent, executed an assignment of all the property of the company to trustees, to hold for the use of the Parker Vein Coal Company; that the directors then, with the consent of the plaintiff, as a stockholder of the Parker Vein Coal Company, organized a new company in Maryland called the American Coal Company, and instructed the trustees to sell all the property of the Parker Vein Coal Company, and that the proceeds of that sale, the whole property, was conveyed to the American Coal Company; that that property constituted the capital stock of the American Coal Company; that the stock of the American Coal Company was issued in certain proportions to the stockholders of the Parker Vein Coal Company, who co-operated in these proceedings; that these stockholders received the stock in the new company, in exchange for the stock in the old company; that the plaintiff was among the

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stockholders of the Parker Vein Coal Company who took stock in the American Coal Company, under this arrangement, by which his interest in the stock of the Parker Vein Coal Company was transferred to a corresponding interest in the American company, and that the last stock exceeded in value what he gave for the stock in question; and that he did this with full knowledge of the over issue. This testimony was objected to and excluded, and the defendants excepted.

Judge Allen, in charging the jury, said this was a case of some importance, not only by reason of its own character, the position of the defendants, and the amount involved, but also as being one of several causes involving substantially the same question; and if this case were properly disposed of by the jury and the court, it would probably facilitate the other cases still pending. He did not flatter himself that this trial would terminate this particular litigation. Several rulings had been made by the court, to which exceptions had been taken, and in respect to which doubts were resting in his own mind by reason of seemingly conflicting decisions of the general term. To the rulings of the court, however, the counsel submitted, taking exceptions, which gave them the opportunity of review. With this the jury had nothing to do. The question to be submitted to them was purely one of fact: to that they were to respond, and for the right disposition of it, they were responsible. The cause of action, as originally commenced, was three fold in character. First, assuming the stock to be genuine, the plaintiff charged the defendant with over issuing stock by reason of which the plaintiff's stock became diminished in value. The court had ruled that this was a course of action on which he could not recover, to which the plaintiff took exception. The second count was for fraudulent representations in respect to the financial condition of the company, by reason of which the plaintiff was induced to purchase the stock; the defendant representing the company to be prosperous, and the stock to

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be valuable, when in truth it was not so. If the plaintiff had really purchased this stock upon such representations, made by the defendant, and the representations were untrue in point of fact, doubtless it would give him a cause of action; but the court thought, and the cause had been tried upon that theory, that in the first place the complaint was not so framed as to authorize the recovery on that ground; he also thought the evidence was not sufficient, and it was safer to charge the jury that the plaintiff could not recover upon the second cause of action, and that the plaintiff could only recover on the last cause of action, to wit, that this stock was spurious. In order to entitle the plaintiff to recover, he must prove to the satisfaction of the jury: 1st. That the certificate of scrip bought by him, did not represent genuine stock, or any part of the capital stock of the company, but formed part of the over issue, not authorized by the charter of the company. 2d. That the defendant issued, or caused to be issued, spurious and unauthorized scrip. 3d. That plaintiff bought the same, or parted with his money on the faith that the certificates were issued *bona fide*, and represented so much of the capital stock of the company. In the first place, it was proved by the book-keeper that there was a large amount of over issue. That was proved by evidence to which the defendant took exception. But the evidence was submitted to them. The witness said that before August 6, 1853, (which was the date of the first purchase by the plaintiff,) the over issue had commenced. To what extent it had gone was not material. It was enough to prove that up to that time, the full capital stock had been issued, and over issues had then commenced by the parties. It was also proved by the confessions of the defendant, that over issues had commenced at that time, and that over issues to a large amount (about \$3,000,000) were made by the defendant. There was no dispute about the agency of the defendant in those over issues—that is, if there was an over issue, the defendants were the agents by whom they were

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stockholders of the Parker Vein Coal Company who took stock in the American Coal Company, under this arrangement, by which his interest in the stock of the Parker Vein Coal Company was transferred to a corresponding interest in the American company, and that the last stock exceeded in value what he gave for the stock in question; and that he did this with full knowledge of the over issue. This testimony was objected to and excluded, and the defendants excepted.

Judge Allen, in charging the jury, said this was a case of some importance, not only by reason of its own character, the position of the defendants, and the amount involved, but also as being one of several causes involving substantially the same question; and if this case were properly disposed of by the jury and the court, it would probably facilitate the other cases still pending. He did not flatter himself that this trial would terminate this particular litigation. Several rulings had been made by the court, to which exceptions had been taken, and in respect to which doubts were resting in his own mind by reason of seemingly conflicting decisions of the general term. To the rulings of the court, however, the counsel submitted, taking exceptions, which gave them the opportunity of review. With this the jury had nothing to do. The question to be submitted to them was purely one of fact: to that they were to respond, and for the right disposition of it, they were responsible. The cause of action, as originally commenced, was three fold in character. First, assuming the stock to be genuine, the plaintiff charged the defendant with over issuing stock by reason of which the plaintiff's stock became diminished in value. The court had ruled that this was a course of action on which he could not recover, to which the plaintiff took exception. The second count was for fraudulent representations in respect to the financial condition of the company, by reason of which the plaintiff was induced to purchase the stock; the defendant representing the company to be prosperous, and the stock to

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be valuable, when in truth it was not so. If the plaintiff had really purchased this stock upon such representations, made by the defendant, and the representations were untrue in point of fact, doubtless it would give him a cause of action; but the court thought, and the cause had been tried upon that theory, that in the first place the complaint was not so framed as to authorize the recovery on that ground; he also thought the evidence was not sufficient, and it was safer to charge the jury that the plaintiff could not recover upon the second cause of action, and that the plaintiff could only recover on the last cause of action, to wit, that this stock was spurious. In order to entitle the plaintiff to recover, he must prove to the satisfaction of the jury: 1st. That the certificate of scrip bought by him, did not represent genuine stock, or any part of the capital stock of the company, but formed part of the over issue, not authorized by the charter of the company. 2d. That the defendant issued, or caused to be issued, spurious and unauthorized scrip. 3d. That plaintiff bought the same, or parted with his money on the faith that the certificates were issued *bona fide*, and represented so much of the capital stock of the company. In the first place, it was proved by the book-keeper that there was a large amount of over issue. That was proved by evidence to which the defendant took exception. But the evidence was submitted to them. The witness said that before August 6, 1853, (which was the date of the first purchase by the plaintiff,) the over issue had commenced. To what extent it had gone was not material. It was enough to prove that up to that time, the full capital stock had been issued, and over issues had then commenced by the parties. It was also proved by the confessions of the defendant, that over issues had commenced at that time, and that over issues to a large amount (about \$3,000,000) were made by the defendant. There was no dispute about the agency of the defendant in those over issues—that is, if there was an over issue, the defendants were the agents by whom they were

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effected. The stock was made out either to Mr. Jewett, or to those to whom he transferred it; so the book-keeper testified. In other words, that no over issue was made, except Mr. Jewett had part in it. Mr. Mali was president; and signed all the scrip; so that the agency of the defendants was established. In respect to the fact that the plaintiff bought these certificates of stock, supposing them to be good, there was no reasonable doubt. It was not suggested that he bought them, supposing them to be spurious.

Now, as to whether the certificates in question were part of the over issue, that was the only question for the jury to determine. The court charged that the certificates bearing date, and having been issued after the stock of the company was full, and after the over issues commenced (if such was the fact) was evidence to be submitted to the jury, and which, if uncontradicted and unexplained, authorized them to find that this particular stock was spurious. That is, that the certificates bearing date and having been issued after the stock was full, that fact alone, without other evidence in the case to contradict or explain it, or to show that the stock was based upon scrip before issued, and returned, would be sufficient for the jury to find a verdict for the plaintiff on the question of fact. Not that they were bound to do so, for that was a matter for the exercise of their judgment and discretion. And the jury were to bear in mind that whether this was genuine or spurious stock was known to the defendants, if they had a knowledge of the affairs of the company, which they were presumed to have.

It was claimed by the defendants that this was no evidence to go to the jury, and to the decision of the court that it was evidence they excepted. Then the defendants contended that this evidence was overcome by the testimony of the book-keeper of the company, who stated that these certificates were issued either upon the surrender of other certificates or upon the transfer of stock. The book-keeper made a distinction between the surrender of former certificates and

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the transfer of stock. What the witness meant by that the court did not exactly know. He testified that those certificates of spurious stock were made out directly to Mr. Jewett, or to persons to whom he transferred. He said that the certificates were not issued for stock originally purchased that day by Mr. Shotwell; and also, in another part of his testimony, that it was impossible for him to say on what consideration this scrip did issue, or to distinguish this scrip, or to tell whether it was part of the genuine or spurious stock. It would be for the jury to say whether this overcame the other evidence, and to say whether the transfer of stock testified to by Clarke was a part of the over issue or not. If it was an issue of scrip on the transfer of good stock, that ended the action.

Then, in relation to the plaintiff voting upon the stock, if the plaintiff voted in person or by proxy upon his stock, it was a circumstance tending to prove that the stock was genuine; but whether it did prove it was for the jury to say, under all the circumstances and evidence of the case. If the company, by its agents at the polls, suffered any man to vote on this stock, it would be some evidence to show that they treated it as genuine; but if it was so treated without knowledge that it was spurious stock, when in fact it was, it would amount to nothing. The evidence was that the plaintiff went to Mr. Carpenter's office, and gave a proxy to some one to vote for him. Who that was, and whether it was used, did not appear. That would be no evidence, except that the plaintiff supposed he had, at the time, genuine stock.

These were all the principles of law involved; and after all, it resolved itself into the fact whether, on this evidence, the stock in question was genuine or spurious. If spurious, the plaintiff was entitled to recover the amount claimed by him.

The counsel for the defendants asked the court to charge several propositions, which he would now dispose of: 1. That there is not sufficient evidence to warrant a finding that the stock in question is not genuine. That I refuse to charge.

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(The defendants excepted.) 2. That even if spurious, there is no evidence that the certificates in question were purchased from the defendants, or from the Parker Vein Coal Company. There is no evidence that the certificates were purchased from either; but I charge, in respect to that, that it is not necessary for the plaintiff to prove that this stock was bought of the defendants or of the company. If the defendants issued this stock, and the plaintiffs purchased it on the faith that it was genuine, authenticated as it was, the defendants are liable, although the actual purchase was made of others. (The defendants excepted.) 3. That if not purchased from the defendants or the company, they are not liable, even if the certificates are spurious. I refuse to so charge. (The defendants excepted.) 4. That if the plaintiff, as holder of certificates, has not been denied by the company any common right of stockholders, he has not been damaged, and is not entitled to recover any more than nominal damages. I refuse to so charge. (The defendants excepted.) 5. That if the plaintiff has directly or by proxy voted on the stock since he became aware of the over issues, he has thereby affirmed the transaction. That I refuse to charge. I charge in respect to that as I have done elsewhere. (The defendants excepted to the refusal, and to the charge as made.) 6. That if he wished to repudiate, he was bound, within a reasonable time, to offer back what he had purchased. That I refuse to charge. (The defendants excepted.) 7. That the plaintiff is not entitled to recover upon an assumption that the stock was depreciated by mixing and confusing spurious with genuine. That I so charge. 8. That there is no sufficient evidence that the genuine and spurious stock cannot be distinguished. So charged. 9. That the burden is upon the plaintiff to produce evidence sufficient to satisfy the jury beyond a reasonable doubt that the stock in question is spurious. I have no fault to find with that, except the words, "beyond a reasonable doubt." I refuse to charge in those words, but I charge that the burden of proof

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is on the plaintiff, and he must satisfy the jury, by evidence, of the truth of his allegations. 10. That if the jury believe that the certificates in question were issued upon a surrender or transfer of stock certificates previously issued, then they are not at liberty to find that the stock in question had its origin in an over issue. That I so charge. 11. That the plaintiff is not entitled to recover on the second cause of action, or on the ground of any false representations or concealment in the statement alleged; and the plaintiff cannot recover, unless the jury is satisfied that the certificates produced, or some of them, or some part of the stock therein mentioned, had its origin in an over issue of stock. That I have already charged. The defendants' counsel took exception to each refusal of the court to charge as requested. They also excepted to the court charging that it was for the jury to find whether the transfer of stock testified to by Clarke, was a part of the over issue. Mr. Bidwell for the plaintiff, asked the court to charge in reverse of what it had charged, and took exception to the charge that the plaintiff could not recover upon the first or second count. He also excepted to the charge that the plaintiff was not entitled to recover on the assumption that the stock depreciated by mixing and confusing spurious with genuine, and that there was no sufficient evidence that the genuine and spurious stock could not be distinguished.

The court directed that the questions of law and exceptions be heard in the first instance at general term, and that entry of judgment on the verdict be in the meantime stayed.

The jury brought in a verdict for the plaintiff, for \$4571.64.

M. S. Bidwell, for the plaintiff. I. The question whether the plaintiff was induced to purchase the stock in consequence of the representations made by Mali was properly admitted. It was proper for the plaintiff to prove the fact of his having been thus induced to make this purchase, and no one but the

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plaintiff himself could give direct and positive testimony of that fact. It was, therefore, proper to ask him the question. No objection appears to have been made to the form of the question as a leading question; and if there had been, it was a matter entirely for the discretion of the judge, which could not be reviewed on a bill of exceptions.

II. The question what the defendant Mali said to the witnesses Mr. Mead and Mr. Bramhall in relation to the over issues, was admissible. Such over issue was a proper subject of inquiry under the pleadings in this case. It was a matter in issue in the case. The declarations of the defendant on the subject were admissible evidence against himself.

III. The question whether Mr. Shotwell was a stockholder in the American Coal Company was properly excluded. It had no relation to any matter in issue in the case. (1 *Phil. Ev.* 169.) Moreover, it was not proper on cross-examination, as it did not grow out of the direct examination; and the court, for this reason, had a right in its discretion (if it were not bound) to exclude the question. (*The Philadelphia and Trenton Rail Road Co. v. Stimpson*, 14 *Peters*, 448, 461. *Floyd v. Bovard*, 6 *Watts & Serg.* 75.)

IV. The motion to dismiss the complaint was properly denied. There was evidence to go to the jury to prove the facts stated in the complaint, and controverted by the defendants. There was evidence of an over issue (and to an enormous amount) of spurious stock by the defendants; indeed, the allegations of such over issue in the complaint were not controverted. There was evidence to go to the jury to prove that the stock held by the plaintiff was a part of such over issue. The certificates were dated after the full amount of genuine stock had been issued. *Prima facie*, therefore, this was not genuine stock. If it should be objected to this *prima facie* evidence that, as the presumption of law is always against fraud until the contrary is proved, it must be presumed that these certificates were not fraudulent; the answer is, that this legal presumption was rebutted by express proof

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that the defendants did make a fraudulent issue of spurious stock, to an enormous amount; so that there can be no presumption of law in this case that this was not spurious stock. Such issue of spurious stock was alleged in the complaint, and not controverted in the answers. It was also clearly proved by express and positive testimony. There was *prima facie* evidence that the stock held by the plaintiff was spurious; there was evidence, therefore, to go to the jury. It was not necessary for the plaintiff to prove that the certificates held by him were not granted upon a transfer of genuine stock. If the defendants, in opposition to the plaintiff's *prima facie* evidence, affirmed that the certificates were issued upon a transfer of genuine stock, the onus of proving it was upon them: (1.) Because on this question they held the affirmative. (2.) Because it was a fact peculiarly within their knowledge and cognizance. (1 *Phil. Ev.* 198, 199. *Clarke v. Miller*, 4 *Wend.* 628. 1 *Greenl. Ev.* § 79.) The defendants had peculiar knowledge of the facts, and could tell better than the plaintiff, or any one else, whether these certificates were spurious. And as the law now makes them competent witnesses in their own favor, there are stronger reasons than ever for throwing the *onus probandi* on them in such case. If these certificates were not a part of the over issue, the defendants, who must have known the facts, would have proved it by their own testimony. It is to be presumed from their silence that this stock was spurious. If upon the evidence it was doubtful whether these certificates were or were not a part of such over issues, the question being one of fact upon the evidence, was to be determined by the jury, not by the court. It was proper, therefore, for the court to deny the motion to dismiss the complaint.

V. It was unnecessary to prove that these certificates were purchased directly from the defendants. That fact was not alleged in the complaint; it was sufficient for the plaintiff to prove the facts stated in his complaint. (*Smith v. Elder*, 3 *John.* 113. *Safford v. Stevens*, 2 *Wend.* 158, 163. *Ed-*

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monds v. Walter, 3 *Starkie*, 7. *Holt v. Miers*, 9 *Car. & P.* 191. *Blunt v. Zunta*, *Anthon's N. P.* 180. *Sandford v. Sanford*, 2 *Day*, 559. *Chapman v. Bullington*, 3 *Gale & Dav.* 33. *Brewer v. Strong*, 10 *Alabama R.* 961.) At all events, in this case it was sufficient to prove the facts alleged in the complaint. Upon proving the truth of the allegation contained in any one count or separate statement of a cause of action, the plaintiff was entitled to a verdict. Each of the defendants had demurred to each of these counts or separate statements, on the ground, among others, that it did not state facts sufficient to constitute a cause of action. All these demurrers had, after very full argument, been overruled by the court, (first at special term, and afterwards on appeal at general term,) with leave to them in the usual form to answer. They availed themselves of this leave, and put in answers. They were thereby concluded from disputing afterwards the point involved in these decisions. It was *res judicata*; it was the law of *this* case, if it were not of any other. (*Atkinson v. Manks*, 1 *Cowen*, 693, 709. *Campbell v. Stakes*, 2 *Wend.* 137, 144. *McElwain v. Willis*, 9 *id.* 552, 556. *Brady v. Donnelly*, 1 *Comst.* 126. *Edwards v. Blunt*, 1 *Str.* 425. *Cresswell v. Packham*, 6 *Taunt.* 630; *S. C.* 2 *Marsh*, 326. *Mansel on Demurrer*, 162, 10 *Law Lib. N. S. Graham's Prac.* 641.) It is quite immaterial, therefore, what this court or any other court may have decided in any other case. It is settled as the law of this case that it is not necessary for the plaintiff to prove that he purchased the stocks directly from the defendants.

VI. If, however, it were proper to reconsider the question, the court would find it their duty to come to the same result. (*Bagshaw v. Seymour*, 93 *Eng. Com. L. R.* 873. 32 *Law Times R.* 81.) There is no necessity to prove in such a case any dealing or privity between the parties. Even in case of contract the necessity of such a privity was long ago exploded. (*Dutton v. Poole*, 2 *Lev.* 210; 2 *Raym.* 302. *Schemerhorn v. Vanderheyden*, 1 *John.* 139. *Forsyth v. Ganson*, 5

Wend. 558. *Brook v. Marbury*, 11 *Wheat.* 78, 97. *Starkie v. Mill*, *Styles*, 296. *Carnegie v. Morrison*, 2 *Metc.* 381, 401, 403.) In matters of tort it never existed. It is sufficient to prove that the plaintiff has sustained damage in consequence of the wrongful act of the defendants. A system of jurisprudence which would allow a defendant in such a case to escape all liability, would be manifestly defective in justice and good conscience. Our laws cannot be charged with such a defect. The rule is laid down briefly, but distinctly and fully, by C. B. Comyns, in these words: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages." (*Com. Digest, Action on the Case, A.*) The same rule was laid down by our own great commentator on our law, in a judgment delivered by him in the court of chancery, in similar brief, pointed and explicit terms. "Fraud and damage coupled together will entitle the injured party to relief in any court of justice." (*Bacon v. Bronson*, 7 *John. Ch. R.* 194, 201.) He had some years previously, in delivering as chief justice the judgment of the supreme court, declared this rule, and added it emphatically to be a *principle of universal jurisprudence*. (*Upton v. Vail*, 6 *John.* 183, 184. *Barney v. Dewey*, 13 *id.* 226. *Benton v. Pratt*, 2 *Wend.* 385.) It would be most unreasonable to make it a condition of the wrongdoer's liability to pay the damages occasioned by his fraud, that he should be reached only in a roundabout way, by a succession of actions between the different individuals through whose unintentional and unconscious agency the damage may have been sustained or developed. This is not according to the spirit and policy of our law. It does not establish any such circumlocution office or proceedings. It discountenances multiplicity of suits. The jurisdiction of chancery in a large class of cases is founded upon this policy, which, in fact, is one of the maxims of the law. (*Francis' Max.* 35. 1 *Story's Eq. Jur.* § 64, *k.*)

VII. In this case, however, there was a privity between

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the plaintiff and the defendants. The certificates of this spurious stock were issued by the defendants to him ; that this was done through the intervention of agents or brokers, does not alter the case. It was legally, as well as morally, a transaction between the plaintiff and the defendants. Neither would it be altered by the fact, if it had been proven, that these certificates were used in place of other certificates, for the defendants are answerable for each successive false certificate. Neither would it be altered by the fact that they were handed in blank to third persons, for in such a case such third persons are deemed in law authorized by the defendants to hand them to others, and therefore the defendants are regarded as dealing with such others. (*Allen v. Addington*, 7 Wend. 9. *Williams v. Wood*, 14 id. 126. *Thomas v. Winchester*, 2 Selden, 397. *Lobdell v. Baker*, 1 Metc. 193. 3 id. 469. *Kinney v. Stone*, 7 id. 252. *Polhill v. Walter*, 3 B. & Adol. 114. *Young v. Hall*, 4 Georgia R. 95. *Townsend v. Wathen*, 9 East, 277. *Dixon v. Bell*, 5 Mau. & Sel. 198. *Scott v. Shepherd*, 3 Wilson, 894, 898. *Boswell v. Prior*, 12 Mod. 639.) The certificates held by the plaintiff were signed by the defendants ; even if considered as a mere authentication, the defendants thereby became liable to the plaintiff. Such certificates or authentications were false and fraudulent representations of the defendants to the plaintiff. A person becomes liable, if he is silent when he ought to speak, even where there is no fraud. How much more, when by his actual attestation he fraudulently mislead others.

VIII. The defendants have no just cause of complaint of the charge made by his honor the judge. On the contrary, it was, in various respects, too favorable to them. The plaintiff was not bound to offer back the certificates to the company. They were issued in fraud of the company by the defendants ; the company had no interest in them, and, being spurious and fraudulent, they could not be of any value to any one. It was, moreover, in no sense a case for repudiation. It was a case of a flagrant fraud. The plaintiff was

no more required to return the certificates of stock than he would have been to return a letter containing a false representation, on which he had brought an action to recover the damage resulting from such false representations.

IX. The case, as it appears in proof, is one of flagrant and stupendous fraud. False certificates of stock to a vast amount were issued by the defendants, the very persons whose official, special and imperative duty it was to guard against frauds. The plaintiff was an innocent purchaser of some of these certificates. He paid for them on the written representations of the defendants that they were genuine and valid, when, in truth, as they knew, they were spurious and entirely worthless and void. There is reason to believe, upon the evidence, that the defendants by these frauds have acquired immense sums of money. They have made no restitution; no reparation; but they keep these dishonest gains; and now set up no defense but mere technical objections to the form of proceeding.

X. The plaintiff under these circumstances hopes that a judgment will be rendered by the court that will protect the innocent against the guilty, and not the guilty against the innocent, and will vindicate and uphold good morals and the character of our country. The following additional decisions are referred to, on the general question of the liability of persons guilty of frauds similar in kind though not equal in degree to those of the defendants. It will be perceived that courts in England of less extensive jurisdiction than this court have not, in administering the same law as ours, found any difficulty in making such transgressors answerable for their frauds. (*Cross v. Sackett*, 2 Bosw. 617; *S. C.*, 6 Abb. Pr. Rep. 247. 16 How. Pr. Rep. 62. *Morse v. Switz*, 19 id. 275. *Scott v. Robinson & Dixon*, *Queen's Bench in England*, January, 1859. *The Times* (London,) 28th January, 1859. *Regina v. Brown et al. Directors of the Royal British Bank*, 1857. *Harper v. Chamberlain*, 11 Abbott's Pr. Rep. 234.)

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C. O'Connor and *J. M. Van Cott*, for the defendants. I. The complaint should have been dismissed. The general term in this district gave judgment for these defendants on the precise ground on which the court directed this verdict for the plaintiff. (*Seizer v. Mali*, 32 Barb. 76.)

II. If the plaintiff's stock is spurious he has a perfect remedy against his vendor. (*Seizer v. Mali*, *supra*. *Kendall v. Stone*, 1 Seld. 14. *Gompertz v. Bartlett*, 75 E. C. L. R. 849. *Kempson v. Saunders*, 4 Bing. 5. *Nockles v. Crosby*, 1 Barn. & Cres. 814.) There is no pretense, here, that such vendor is not pecuniarily responsible as well as liable, or that the remedy against him is in any respect inadequate. To throw away such adequate remedy is a self-inflicted damage, which it is not the business of courts of justice to redress.

III. On the principle of this verdict, the assignee of any invalid non-negotiable chose may, without privity, recover against the maker, or any intermediate party through whose hands it has passed. But no adjudged case sanctions such a principle. (*Thomas v. Winchester*, 2 Seld. 397. *Seizer v. Mali*, *supra*. *Mechanics' Bank v. The N. Y. & N. H. R. R. Co.*, 3 Kern. 599. *Farmers and Mech. Bank v. Butchers and Drovers' Bank*, 16 N. Y. Rep. 125. *Zabriskie v. Smith*, 3 Kernan, 322.)

IV. Even if a purchaser in good faith from the defendants could transfer his remedy with the spurious stock, it would be for his vendee to show that his vendor was a *bona fide* purchaser. But, on the principle of the verdict, the plaintiff's vendor might have bought with notice, without prejudice to the plaintiff's remedy.

V. There was no evidence that the stock was spurious, sufficient to be submitted to the jury. There were 30,000 shares of genuine stock in existence, which were subject to daily transfer on the books of the company. There were two modes of making such transfer, viz: 1. Where the transferer had stock standing on the books to his credit, without hold-

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ing certificates, the transfer was made from his account to the transferee's stock account, or by the issue of certificates to the transferee. 2. Where the transferer held certificates, by the surrender of such certificates, and the issue of new certificates in their place to the transferee. The evidence is positive that the stock was issued to the plaintiff in one of these two modes, and not by a sale, as of new stock to him at the office of the company. Unless *all* transfers on the company's books, after the over issue commenced, were, in judgment of law, transfers of spurious stock, the jury had *no evidence* on which to found a verdict that the stock in question was *spurious*. A legal presumption so injurious to holders and purchasers of genuine stock ought not to be permitted; especially is this so in the light of a ruling "that there is no sufficient evidence that the genuine and spurious stock cannot be distinguished." It is a corollary of that ruling, that the *onus* was on the plaintiff to show, by evidence, that the stock in question was spurious.

VI. Not only was there no evidence on which to raise a presumption that the stock was spurious, but there was strong affirmative evidence that it was genuine. 1. It was in the *form* of genuine stock, with the usual authentication of genuine official signatures. 2. The plaintiff had, presumptively, the means of proving it to be spurious, if not in fact genuine; and he held the affirmative. 3. The stock was voted upon, as genuine, on the plaintiff's proxy; which was almost conclusive evidence of its genuineness. 4. The defendants offered to prove that, by the plaintiff's vote on the stock, all the corporate property had been transferred to a new company, and that, on the basis of that vote and transfer, he had exchanged the stock in question for a full equivalent of stock in the new company. 5. The evidence received, with that excluded, showed that the plaintiff had claimed the stock to be genuine; that the company had allowed his claim; and that, on such claim and allowance, he had shared in the final dividend of the corporate property at the dissolution. The

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conclusion seems inevitable, that the court erred in submitting to the jury the single question of fact on which the verdict rests.

VII. The over issued stock, if not so far authorized as to be valid, was so ratified by the company as to entitle the plaintiff to be indemnified by it. And he obtained that indemnity from the company by taking his dividend in the corporate property transferred to a new company, in which he exchanged his shares, old for new.

VIII. Evidence was offered that the plaintiff had realized on the stock in question, by the consent and allowance of the company, property and interests of value probably equal to or exceeding all that he paid for it, and this evidence was excluded. This was clearly erroneous. The plaintiff was entitled to recover only what he lost by the sale of stock to him. After converting it to his own use, making perhaps a large profit on it, he certainly could not recover from the defendants on the basis that their sale of it to him damaged him to the full extent of the sum which he paid for it. This is the basis of his recovery.

By the Court, GROVER, J. The only questions presented by the exceptions relate to the cause of action set forth in the third count of the complaint. Only one of the exceptions to the rulings upon the trial in regard to the admissibility of evidence was insisted upon, on the argument. That related to the offer of the defendants to prove that the plaintiff received stock of the American Coal Company for the stock in question, by the consent of the directors of the Parker Vein Coal Company in value exceeding the sum paid by the plaintiff therefor. This exception is not well taken. The plaintiff's right of action was complete upon the purchase. And this right could not be affected by any subsequent action of the directors of the Parker Vein Company, with which the defendants had no connection. The directors had no right whatever to transfer any of the property of the company on

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account of fictitious stock ; and if they did so, the stockholders could compel the party receiving the property to account therefor. No grounds for the motion to dismiss the complaint, made by the defendants' counsel at the close of the plaintiff's proof, were stated. It is well settled that an exception to the refusal to grant such a motion cannot be sustained on account of the deficiency of any proof that might have been supplied upon the trial, had the attention of the court and the opposite party been called thereto. It is not claimed by the defendants' counsel that evidence might not have been given that would have sustained the action. The exception is not, therefore, well taken.

The real questions in the case arise upon the exceptions to the charge and the refusals to charge as requested. The defendants' counsel requested the court to charge that there was not sufficient evidence to warrant a finding that the stock was not genuine, and excepted to the refusal so to charge. The evidence showed that the entire capital stock of the company had been issued prior to the dates of the certificates purchased by the plaintiff, and also that the defendants, prior thereto, had, as officers of the company, issued spurious certificates of stock to a considerable amount. This evidence created a presumption that the certificates in question were false and fraudulent. This devolved the burden upon the defendants of showing that the certificates were issued either upon the surrender of certificates of genuine stock, or upon the transfer on the books of the company of such stock—facts peculiarly within the knowledge of the defendants. The like principle should be applied as in the case of a party fraudulently mingling his property with that of another so that it cannot be distinguished, in case the defendants so conducted the business that the spurious could not be distinguished from the genuine, as against them. An exception was taken by the defendants' counsel to the charge of the court that it was not necessary for the plaintiff to prove that the stock was bought of the defendants or of the company. That if the de-

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defendants issued this stock and the plaintiff purchased it upon the faith that it was genuine, authenticated as it was, the defendants were liable although the actual purchase was made of others. This exception presents the principal question in the case, and the one mainly relied upon by the defendants' counsel. That is, whether the officers of a corporation, authorized to issue certificates to the stockholders as evidence of title to stock, are liable only to the immediate purchaser of spurious stock falsely and fraudulently certified by them, or liable to any subsequent purchaser buying upon the faith of the false certificate.

This precise question was decided by this court in *Seiser v. Mali*, (32 Barb. 76.) It was there held that the liability extended only to the immediate vendees of the company or of the defendants. I should follow this case, holding the point as adjudicated, in this court, but for the case of *Causeaux v. Mali* (25 Barb. 578) holding the contrary doctrine. These conflicting decisions leave the question open; especially as it does not appear that the attention of the court was called to the latter case, while considering the former. I will briefly state the reasons for my concurrence in the case of *Causeaux v. Mali*. The principle enunciated in the case of *Seiser v. Mali* is doubtless sound. The error, if any, is that the case does not come within it. A vendor guilty of fraud in the sale of property is liable only to his vendee, and a subsequent purchaser does not acquire the right of action. The same rule applies in case of a sale with warranty, and a breach. There is not only no privity, but no fraud practiced or contract made with the subsequent purchaser. It is also true that the purchaser of the stock had a remedy against his vendor for a breach of the implied warranty of title. But does such right of action constitute a bar to an action against one who had induced the purchase by a fraudulent representation that the vendor had title to the stock, where damage resulted from the fraud? Clearly not. That is but the common case of frauds committed in transactions between

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other parties. And it is no answer to the action that the guilty party obtained no advantage from the fraud, or that some remedy, in some form, exists against another party. This action cannot be sustained upon the principle that the plaintiff acquired by his purchase any right of action that any of the prior purchasers of the stock had against the defendants. If sustained at all, it must be upon some other principle. The case shows that the defendants made certificates that certain parties owned specified amounts of stock in the Parker Vein Coal Company, which were false and fraudulent, and caused stock evidenced by such certificates to be sold in the market, and delivered such false certificates to the purchasers. The certificates were affirmations in writing that the parties owned stock as therein expressed. These certificates were presented to the plaintiff, and he purchased upon the faith he reposed therein. It thus appears that the plaintiff purchased upon the written affirmation of the defendants that the party selling had title to the stock; or, in case there was a blank power authorizing a transfer, attached to the certificate, to be completed by filling in the name of any subsequent purchaser desiring a transfer upon the books to him, the effect would be the same. In either case there was the representation of the defendants that the party offering the stock for sale had the right and power to give a title thereto. There is no question but that had the defendants been present upon the purchase by the plaintiff, and then fraudulently represented to the plaintiff that the vendor owned the stock, and the plaintiff was induced thereby to purchase, and he sustained damage from failure of title, the defendants would have been liable to him. It would not be claimed that it would be any defense to the action to show that the defendants had made the same false representations to prior purchasers and were liable therefor. It may be said that the defendants did not authorize the plaintiff's vendors to exhibit the certificate to him, and consequently they are not chargeable with the consequences of such exhibition. Is this

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assumption correct? I think that any one furnishing another with a false and fraudulent document purporting to show title in another to any property, is liable to any one sustaining damage from reposing confidence therein. Upon the same principle that a party writing a fraudulent letter, as to the trustworthiness of another, to a particular person, with a view to induce the giving of credit, by such person, is held liable to another giving credit, upon the faith of the letter, to whom the letter may have been shown. In such case there is no privity between the writer of the letter and the party giving the credit, but the writer has been guilty of fraud, and the party giving the credit has sustained damage therefrom, and this is the foundation of the liability. The case in judgment is still stronger. The defendants knew that upon every sale of the stock the certificates would be presented and delivered to the purchaser as evidence of title; and it may be fairly argued that the defendants authorized such presentation and purchases upon the faith thereof. It follows, then, that the defendants having made and issued their certificates, for the purpose of defrauding, are liable to any one sustaining damage by purchasing stock, in consequence of faith in their truth. It is not necessary in this case to discuss the question whether the damages might have been reduced on account of the plaintiff's right of action against his vendor, for breach of warranty, as no such question was raised upon the trial; nor, for the same reason, to determine what effect the recovery in this case would have upon an action brought by a prior purchaser of the same stock, against the defendants, for any injury such purchasers might have sustained. I will simply remark that, as a general rule, every tort-feasor is liable to every person sustaining an injury from the direct consequences of the wrongful act. The only question submitted to the jury was whether the stock was spurious. It will be seen that I place the defendants' liability upon the ground of having issued the certificates in question with the fraudulent design of enabling some one to transfer spurious

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stock and thereby to defraud the purchasers. It was necessary that this should be established and found by the jury. The evidence tended to show it, and the defendants' counsel did not request any question to be submitted to the jury, except as to the spuriousness of the stock and whether the purchase of the plaintiff was made of the defendants or the company, or whether made of some one else. The former question was submitted and the jury found for the plaintiff. The latter was not material. A new trial should be denied, and judgment rendered for the plaintiff, upon the verdict.

New trial denied.

[NEW YORK GENERAL TERM, November 24, 1862. *Ingraham, Clerks and Grover, Justices.*]

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A trust to pay the rents and profits to J. during her life, and after her death to convey to such of her children as should survive her, contained in a deed of bargain and sale made previous to the revised statutes, was not executed as a legal estate in the *cestuis que trust* by the law of uses then in force.

By such a trust the children of J. during her life took vested equitable estates in remainder subject to be defeated, wholly, by their dying before her; or, in part, by the coming *in esse* of after-born children of J.

The revised statutes, subsequently enacted, did not turn these equitable estates into legal ones during the life of J.

In trusts of real estate, created before the revised statutes, the legal title of the trustee, on his death happening after the revised statutes, descends to his heirs. The revised statutes cutting off descent, in case of trustees are to be construed prospectively.

Proceedings for transferring the title of infant *trustees* under the revised statutes (article concerning the sale of infants' estates) are not affected by the 176th section of the article. That section applies only to the sale of infants' estates *held in their own right*.

Section 65, 1 R. S. 780, making void any sale or act by a trustee in contravention of the trust expressed in the trust deed, applies only to the acts of *trustees*, and does not divest courts of equity of their power over the legal title when vested in infant trustees.

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Courts of equity have inherent jurisdiction, independently of statute, to order a sale of the *equitable* estates of infants.

The statute of New York, providing for the sale &c. of the real estate of infants by chancery, apply only to cases in which the *legal* title is in the infants.

In a proceeding in equity for the sale of the equitable estates of infants in land, such equitable estates may be transferred from the infants by a written contract of sale, or by a parol contract of sale followed by payment, possession, and improvements made by the purchaser, where the sale was made by the guardian of the infants under the sanction of the court.

The equitable title thus acquired constitutes a good defense for the purchaser, in an action of ejectment, when properly set up in his answer, as against the infants after they have arrived at full age.

An adult co-tenant who joins in a petition praying a court of equity to order a sale of the land held by the adult and infant in co-tenancy, is bound by the order made pursuant to his request.

A PPEAL from a judgment entered upon the report of a referee, in an action to recover the possession of real property.

On the 7th of December, 1827, the premises in question, with other lands situated in Rochester, were conveyed to Ira West and his heirs, by deed of bargain and sale, in trust to pay Judith Wood during her natural life the income, rents and profits to arise from the land conveyed, and after her death to grant, release and convey the same land to her children surviving her and to the children of such of her children as might die before her; the grandchildren to take such interest in the land as their parent would have taken if living.

At the execution of the deed Judith Wood had three children, named Morris Wood, Samson Wood and Obadiah C. Wood. Morris Wood died in 1833, leaving two minor children, Lewis and Catherine. In 1832 the trustee, Ira West, died, leaving children who were infants. In 1835 Judith Wood, Samson Wood, and Obadiah C. Wood, who were of full age, together with the widow of Ira West as guardian of his children, presented a petition to the court of chancery before the vice chancellor of the eighth circuit, stating the foregoing facts, and alleging, among other things, that upon the death of the trustee, Ira West, the

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legal title to the land descended to his children who were infants, unable to execute the trust; that Lewis Wood and Catherine Wood, children of Morris Wood, deceased, were infants; that it would be advantageous to all persons interested in the land that the same be sold, and praying that the same might be sold as the court should direct; that a guardian might be appointed for the infants Lewis Wood and Catherine Wood for such sale, and a guardian also appointed for the infant children of Ira West for such sale; and that the infant children of Ira West, through their guardian thus appointed, might execute and deliver to the purchaser a deed of the land. After a reference to and report from a master, the court appointed a guardian for the children of Morris Wood, and a guardian for the children of Ira West, and ordered the land to be sold by the guardian for the children of Morris Wood. This guardian thereupon contracted with Joseph Strong to sell and convey to him the land for \$1800—\$1000 to be paid down, and the balance to be secured by his bond and mortgage on the premises, payable to the clerk of the court—and reported the agreement of sale to the court. The court confirmed the report, and ordered the infant children of Ira West by their guardian to execute a deed of the land to the purchaser, Strong. The deed was accordingly executed and delivered, and Strong paid the consideration as agreed, and entered into possession. The title thus acquired by Strong was conveyed to the defendant, who entered into possession and made valuable improvements thereon in good faith before this action was commenced. The consideration paid by Strong on his purchase was by order of the court in that proceeding invested and secured for the benefit of the parties beneficially interested in the trust deed of 1827, and in the same proportions. Judith Wood died in 1852, leaving no other children or grandchildren than those above named. After her death this action was commenced by Samson Wood, Obadiah C. Wood, Lewis Wood, and Catherine Anderson (formerly Wood) to recover

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possession of the land so sold to Strong and from him to the defendant, who was in possession. The complaint was in the usual form to recover the possession of real property. The answer, in addition to the usual denial, set up the foregoing facts as an equitable defense. Lewis Wood stipulated to admit the defendant's title.

The issues were referred for trial to H. R. Selden, Esq., who found as conclusions of law that the deed to Joseph Strong was void as against the then infants Lewis Wood and Catherine Wood, (now Catherine Anderson,) on the ground that the title of the trustee, Ira West, on his death, could not, under the revised statutes, descend to his children, who through their guardian executed the deed to Strong; that Lewis Wood, however, was estopped by his stipulation from disputing the defendant's title; that Samson Wood and Obadiah C. Wood were also estopped from disputing the defendant's title, by reason of having petitioned the court of chancery for the sale of the land; but that Catherine Anderson, on the death of Judith Wood, became entitled to one undivided sixth part of the land in question, and should recover the same of the defendant.

The defendant appealed, as to so much of the judgment as was against him, and two of the plaintiffs, Obadiah C. Wood, and Lewis Wood, appealed as to so much of the judgment as was against them.

By the Court, JAMES C. SMITH, J. The principal question presented by the defendant's appeal, which I propose first to consider, is whether the proceedings had in the court of chancery, for a sale of the premises in question, vested the purchaser, Joseph Strong, with any title or right of which the defendant, as his grantee, can avail himself under his answer in this action as defense, either legal or equitable, to the claim of Mrs. Anderson.

No question is made by either of the parties but that the deed to Ira West, which was executed in 1827, created a valid

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trust. And I understand all parties to assent to the construction of that instrument contended for by the defendant, that it vested the legal title to the premises in West as trustee, and an equitable estate in Judith Wood for life, remainder to her children then living, subject to be defeated wholly by their dying before her, or in part by the coming in *esse* of after-born children of Judith. This construction is undoubtedly correct. (*Hill on Trustees*, 232, 242. 1 *Mad. Ch.* 449. 4 *Kent*, 304, 305. 20 *Wend.* 374.) Had there been like limitations without the intervention of a trustee, the children of Judith would have taken vested *legal* estates in remainder, subject to be defeated wholly or in part by the same contingencies. (7 *Paige*, 544. 8 *id.* 307.)

It is also doubtless true, as was said by the referee in his opinion, and as seems to have been held by the vice chancellor in the proceedings had before him for a sale of these lands in 1835, that the legal estate thus created in the trustee did not vest in the *cestui que trust* by the operation of the revised statutes, (1 *R. S.* 727, § 47,) at least, so far as the life interest of Mrs. Wood is concerned. In regard to the beneficial interests of the plaintiffs, the referee expressed a doubt whether they were not turned into legal estates, in remainder, by the operation of the statute; but he forbore to decide that question, and disposed of the case upon the assumption that the entire legal estate remained in the trustee until his death, in 1832.

I am of the opinion that the position thus assumed by the referee is correct, not only for the reason suggested by him, that the grantors designed that the legal estate should not vest in the children of Mrs. Wood until after death, but also for the reason that the case is not within section 47 above cited, by which certain trusts are turned into legal estates. Section 48 provides that "the last preceding section shall not divest the estate of any trustees in any existing trust, when the title of such trustees is not merely nominal, but is connected with some *power of actual disposition or*

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management, in relation to the lands which are the subject of the trust." This exception seems clearly to apply to the estate of the trustee in this case, as he was empowered not only to pay the rents and profits to Mrs. Wood during her life, but also to convey the lands after her death. Besides, during the lifetime of Mrs. Wood, her children were neither "entitled to the actual possession," nor to "the receipt of the rents and profits" of the land; and both must concur before the beneficial interest of the party is turned into a legal estate. (§ 47. 2 *Hill*, 574.) But the referee held that upon the death of Ira West the trust estate did not descend to his heirs, but vested in the court of chancery, under the provisions of section 68, (1 *R. S.* 730,) and that therefore the infant children of Ira West, who alone conveyed, by their guardian, to Joseph Strong, had no interest whatever to convey, and their deed, by its own operation, gave no title to the grantee. The correctness of this conclusion depends upon whether the referee is right in his opinion that section 68, above cited, applies as well to trusts created prior to its enactment as to those created subsequently thereto. The section is contained in the chapter of the revised statutes entitled, "Of real property, and of the nature, qualities and alienation of estates therein." Section 11 of the fifth title of the same chapter is as follows: "None of the provisions of this chapter, except those converting formal trusts into legal estates, shall be construed as altering or impairing any *vested estate*, interest or right, or as altering or affecting the construction of any deed, will or other instrument, which shall have taken effect at any time before this chapter shall be in force as a law." That this section embraces *trust estates*, is apparent from the fact that one species of trusts is expressly excepted from its operation. If section 68 does not apply to the trust created by the deed to West, then, by the law as it stood before the revised statutes, the legal estate of the trustee, on his death, descended to his heirs. (5 *Paige*, 561.) Not only was it descendible, but in case of Mrs.

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Wood surviving all her children and grandchildren, the trustee or his heirs would have had a right, on her death, to hold the estate discharged of the trust. (*Hill on Trustees*, 270, 271, and cases there cited.) Before the revised statutes, the trust did not escheat on the death of the *cestui que trust* intestate, and without heirs, for he was not "seised." (1 *R. L.* 389, § 2. 3 *Cruise's Dig., Escheat*, §§ 28, 29.) And the provisions of the revised statutes relating to escheats, (1 *R. S.* 718, §§ 1, 2,) even if they alter the law in this respect, which I am not prepared to hold, are also controlled by section 11 above referred to, and do not affect estates or rights vested before those provisions took effect.

Independently of the express provisions of said section 11, the well established and familiar rule that laws which tend to take away vested rights of property are void, and the courts will therefore always struggle to give statutes a prospective interpretation, seems to demand that section 68, above referred to, be so construed as not to take away or impair the vested rights of the trustee.

The only case cited by the referee in support of his opinion as to the effect to be given to section 68, is *Hawley v. Ross*, (7 *Paige*, 103.) But it is to be observed in regard to that case, (1.) That the remarks of the chancellor on this point are *obiter*, he having decided the case on another ground; (2.) It does not appear that his attention was called to section 11, above referred to; and (3.) The case before him related to *personal* estate only, to which species of property the rule above referred to, which permits the trustee to hold the estate discharged of the trust in certain cases, does not apply. (*Hill on Trustees*, 271.) I am not aware of any other adjudication sustaining the opinion of the referee upon this question, and I have therefore felt at liberty to consider it as *res nova*.

On the other hand, Vice Chancellor Gardiner, who ordered the conveyance of the interests of the children of Ira West, must be regarded as having adjudged, in that proceeding, that

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on the death of West, the legal estate descended to his heirs, as otherwise they had nothing to convey.

If, then, the legal title descended to the heirs of Ira West, it passed by their deed to Joseph Strong, unless that instrument is absolutely void for want of jurisdiction in the court of chancery to authorize the sale.

It is claimed on the part of the plaintiffs, that the deed is in contravention of the provision contained in the article of the revised statutes relating to proceedings for the sale of infants' estates, which prohibits the sale or other disposition of real estate "against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant." (2 R. S. 195, § 176.) But that provision does not apply to this case. (1.) It relates exclusively to such conveyances as give the title to the infant. (*Revisers' notes*, 3 R. S. 2d ed. 675.) Here, the estate descended to the children of West. (2.) It has no reference to legal estates held by infants in trust. It is transcribed from the act of 1815, (*Laws of 1815*, p. 103, § 3,) which was an amplification of an act passed in the preceding year, (*Laws of 1814*, p. 128,) whereby the court of chancery in this state was first clothed with the power of authorizing a sale of legal estates held by infants in their own right. The power to authorize or compel an infant seised of lands "by way of mortgage, or in trust only for others" to convey the same, is of a very different nature, and had been previously conferred upon the court. (1 R. L. 148, § 7.) The statute giving it did not contain the restriction upon which the plaintiffs rely. Its provisions, in substance, were adopted in the revised statutes, (2 R. S. 194, § 167,) and from them alone the court derived its power to order a sale of the legal estate of the infant trustees. As will be seen presently, the power which it exercised at the same time, in respect to the equitable estates of the infant cestuis que trust, had a different origin. These views do not conflict with the case of *Rogers v. Dill*, (6 Hill, 415,) cited on the argument; as there the lands were devised

to the infants in their *own* right, with a clause in the will prohibiting a sale till 1837, and in making the sale, the prohibition was disregarded.

The plaintiffs also insist that the deed to Strong is within the provision of the revised statutes, which declares that "when the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void." (1 *R. S.* 730, § 65.) The object of this provision is to protect *cestuis que trust* from the unauthorized acts of their trustees, by charging persons dealing with the latter with knowledge of the trust. (*Revisers' notes*, 3 *R. S.* 2d ed. 586.) I apprehend it is not intended to divest courts of equity of their power in respect to selling the legal estates of infant *trustees*, which power, as has been seen, is preserved by the revised statutes. The exercise of such power does not affect the *cestui que trust*, for the purchaser acquires only the rights of the trustee. Nevertheless, as trustee, he can set up his legal estate, *at law*, even against the *cestui que trust*. (*Doe v. Staple*, 2 *D. & E.* 684. *Doe v. Wroot*, 5 *East*, 132. *Jackson v. Chase*, 2 *John. Rep.* 84. *Moore v. Spellman*, 5 *Denio*, 225.)

Again ; if the title descended to the children of West, then the petition upon which the court of chancery acted in ordering a sale, presented, on its face, a case of lands held by infant trustees, within the jurisdiction of the court respecting the sale of infants' lands, (2 *R. S.* 194, § 167,) and the decision of that court in regard to the construction of the several statutory provisions now invoked by the plaintiffs, whether correct or otherwise, must be regarded in every other court as binding upon the parties to that proceeding, until reversed. (5 *Selden*, 266, and cases there cited.)

It follows, from the foregoing considerations, that the defendant established a complete legal defense to the claim of the plaintiffs in this action. The conveyance to Strong, executed in pursuance of the order of the court, transferred the

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legal title of the heirs of West as effectually as if it had been made by the heirs themselves when of lawful age, (2 R. S. 194, § 168,) and the defendant, at the commencement of the action, held the title which passed by that conveyance.

I am also of the opinion that the defendant has a valid equitable defense, of which he may avail himself under his answer.

The equitable estates in remainder which, as has been seen, the plaintiffs held in the land in question, at the time of the proceedings in chancery, were transferable in equity. They were not mere possibilities. (5 Paige, 466.) Even possibilities coupled with an interest are assignable, in equity. (7 Paige, 70. 2 Selden, 186, 187.) So, of trust estates. (2 Stor. Eq. Jur. § 974.) Under the revised statutes, these estates are alienable. (1 R. S. 723, §§ 9, 13. Id. 725, § 35.) There is nothing in the trust deed prohibiting the plaintiffs from selling their interests. If of full age, they could undoubtedly have sold their equitable interests during the lifetime of their mother. (2 Story's Eq. Jur. § 974. 10 John. 494. 1 Barb. Ch. 412.)

The court of chancery had inherent jurisdiction, independently of statute, to order a sale of the equitable interests of the infant plaintiffs. It is a settled principle, that whenever the property of infants consists of real or personal estate, the title to which is in trustees, the chancellor, as the general guardian and protector of the rights of infants, may authorize such a disposition thereof as he, in the exercise of a sound legal discretion, may deem most beneficial to such infants, provided the rights of other persons are not prejudiced thereby. (20 Wend. 375, 6, 380.) Whatever restrictions may have been put upon this power by the provisions of the revised statutes rendering trustees incapable of transferring the title to trust estates, in contravention of the trust expressed in the instrument creating such estates, (Id. 376,) it is conceived that courts of equity still have the power, which they have long exercised, of changing the estates of infants

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from real into personal, and from personal to real, whenever they deem such a proceeding most beneficial to the infant. (3 *John. Ch.* 370. 5 *id.* 163.) When the court directs any such change of property, it also directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state, and thus the objects of the trust are not contravened, and the rights of the *cestui que trust* are fully protected. In the proceedings which were had for the sale of the interests of the plaintiffs in this case, their lands were exchanged, by the direction of the court, partly for other lands, and partly for money, the payment of which was secured by the bond of the purchaser and a mortgage on the lands sold, executed to the clerk of the court, for the benefit of the plaintiffs. The lands taken in exchange were conveyed directly to the plaintiffs and Judith Wood, without the intervention of a trustee, and have since been sold in a partition suit to which they were parties, and all of them, Mrs. Anderson included, have received their shares of the avails of the sale. Assuming that the power of the court went no further than to change the property, not absolutely, but with the qualification that the infant owners, on coming of age, could take the original estate at their option, and assuming, further, that Mrs. Anderson, by reason of her coverture, ignorance of her rights, or any other circumstance, is not estopped by lapse of time from claiming her original estate, nevertheless her remedy is not *at law*, but in equity, where, on her restoring or offering to restore what she has received, or showing that without her fault it is not in her power to do so, such decree may be made as will best protect the equitable rights of the purchaser as well as her own.

The statutes above referred to give the court of chancery power over infants' *legal* estates, only. (4 *Comst.* 266.) But the power is ample; and it would be a remarkable anomaly, if the court had not, also, a jurisdiction at least equally extensive, in respect to infants' *equitable* estates, which, by

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their very nature, are under its peculiar and exclusive care. There are remarks to be found in some of the reports, to the effect that the power of the court is derived wholly from statute, but so far as I have observed, they occur in cases involving sales of *legal* estates, and should be understood as referring to such estates only.

This question, and some others discussed in this case, have been set at rest by an unreported decision of the court of appeals. In the case of *Pitcher v. Carter*, (4 *Sandf. Ch.* 1,) V. C. Sandford held that under a conveyance of real estate, *prior* to the revised statutes, in trust to pay the income to the grantees for life, and, after their decease, to convey to their heirs, the children of the grantors, while the latter survived, and after the statutes took effect, had an equitable and not a legal interest, and that the court of chancery could authorize the trustee to dispose of the infants' equitable estate, as the court deemed most beneficial for their interests. He held, further, that a co-ordinate tribunal cannot review the decision of the court of chancery made upon an application for the disposal of an infant's *equitable* estate. But he also held that the order of the court authorizing the mortgage executed by the trustee in 1837, which was sought to be foreclosed in the action before him, was obtained by a fraud against the infants and was void, and that the mortgage could not be enforced against them; and on that ground he dismissed the bill. This decision was made in 1846. In 1849 it was reversed by the supreme court, before Justices Hurlburt, McCoun and Edwards; they holding that there was no fraud in obtaining the order, and that the authority to execute the mortgage was properly exercised. (4 *Sandf. Ch.* 21, *note*.) The decision of the supreme court was affirmed by the court of appeals in 1851, and although the members of that court were divided, it is understood that the only question respecting which they differed, was whether the purpose for which the mortgage was made, was authorized by the order of the court. (*MS. opinion of Gardiner, J.*)

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It seems clear, therefore, upon principle and authority, that the court of chancery had power to order a sale of the equitable interests of the infant plaintiffs in the premises in question. It remains to consider whether the court exercised that power in the proceedings had before it.

The petition, which was presented by the adult plaintiffs, their mother and her then husband, and the infant heirs of Ira West, by their mother and guardian, set forth among other things the trust deed, and the death of the trustee, and alleged that on his death the legal estate in the lands descended to his heirs, and that no person except the other petitioners, and the children of Morris Wood, deceased, who are the infant plaintiffs in this suit, "had or could have any *beneficial interest*" in the premises. It alleged that it would be advantageous for *all* concerned and *interested* in the premises that they be sold, &c., and prayed the court to order a sale of *the premises*; and further, that "Judith Sampson be appointed guardian of said infants Lewis Wood and Catherine Wood" (Mrs. Anderson) "*for such sale,*" and that Eliza West be appointed guardian of the infant trustees, for such sale. It is true, the only conveyance prayed for was a deed of the estate of the infant trustees, but that is all that was necessary, since, as will be seen presently, a deed was not required to pass the equitable interests of the *cestuis que trust*. This petition presented a proper case for the exercise of the jurisdiction of the court in respect to the sale, not only of the legal estate of the infant trustees, but also of the beneficial interests of the infant *cestuis que trust*. It appears by the stipulation of the parties, and the referee has found, that the guardians were appointed as prayed for, and the *premises* were ordered to be sold by the guardian for the infant *cestuis que trust*, under the direction of a master; that in pursuance of such order, and under the direction of a master, she contracted to sell the premises to Joseph Strong for \$1800, which was their full value, and reported the agreement of sale to the court, and the court by order confirmed it, and directed

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the guardian of the infant trustees to execute a deed of the premises to the purchaser, on receiving the consideration therefor, which was done; and that the consideration was paid, and the purchaser went into possession.

The contract of sale made by the guardian of the infant *cestuis que trust*, ratified and confirmed by the court, of itself, transferred their equitable interests to the purchaser, on his paying the price agreed upon therefor. If it was in writing, the equitable title passed thereby, without the formality of a deed; if not in writing, payment, possession and improvements by the purchaser vested the equitable title in him and his grantees. (2 *Story's Eq. Jur.* § 759. 4 *Comst.* 403.) The equitable title thus acquired by the purchaser was transferred to the defendant, who held it when this suit was commenced.

I have not thought it material to inquire whether the court of chancery, in this case, had power to make a sale which would bind after-born children of Judith Sampson, as there were no such children, and besides, the only interests under consideration are those of the two infant *cestuis que trust*, who were then in being. The purchaser, of course, took their interests, and nothing more, and he probably took them subject to all contingencies which attached to them before the transfer.

I think the equitable title thus acquired by the defendant constitutes a defense to the claim of Mrs. Anderson, and as it was properly set up in the answer, the defendant may avail himself of it in this action. (2 *Kernan*, 266.) The judgment in favor of Mrs. Anderson should therefore be reversed.

The foregoing reasoning applies also to the claim of the plaintiff Lewis Wood, and the judgment against him in favor of the defendant should be affirmed. It is unnecessary, therefore, to examine the questions made on the argument, as to the effect of his stipulation which was proved before the referee.

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Judgment was properly rendered against the plaintiff Obadiah C. Wood. He is clearly estopped from setting up title in himself as against Joseph Strong or his assigns. He was an adult and joined in the petition, in which he alleged that the legal title was in the infant children of Ira West, and prayed that the premises might be sold and a guardian appointed for them to convey, and that the proceeds might be disposed of, as was afterwards done. He is thereby estopped from disputing the title of the purchaser. (1 *John. Ch.* 354.)

I think he is also bound by the agreement of sale entered into by Judith Sampson, as if it were his own act. He petitioned the court to sell the premises "in such way" as the court should order. The court ordered Judith to sell the property, and in pursuance of that order she made an agreement of sale to Strong, which the court ratified and confirmed. This agreement bound his equitable interest as completely as if he had made it himself. *Qui facit per alium, facit per se.*

The conclusion is, that as between the plaintiff Catherine Anderson and the defendant, the judgment in her favor should be reversed, and a new trial had; costs to abide the event; and the judgment in favor of the defendant against the other plaintiffs should be affirmed.

The other members of the court concurring, ordered accordingly.

[MONROE GENERAL TERM, December 1, 1862. *Johnson, James C. Smith* and *Wells*, Justices.]

GIBERT *vs.* PETELER and others.

Although a grantee of land be not shown to have had express notice of a restriction in respect to the use of the property, contained in previous deeds, yet if the conveyances under which he holds refer to the deeds in which the restriction is contained, and those deeds are recorded, he will be deemed to have had notice of the existence of such restriction in the original deeds, and of its consequences.

A covenant or agreement restricting the use of any lands or tenements in favor or on account of other lands, creates an easement, and makes one tenement servient and the other dominant; and this without regard to any privity or connection of title or estate in the two parcels, or their owners.

All that is necessary is a clear manifestation of the intention of the person who is the source of title, to subject one parcel of land to a restriction in its use, for the benefit of another, whether that other belong, at the time, to himself or to third persons, and sufficient language to make that restriction perpetual.

Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands, without repaying those expenditures, to the vendees.

If a vendor is unable to make a good title to a portion of the premises, the vendees are entitled to elect whether they will rescind the contract *in toto* and receive back their expenditures under it, or will receive such a conveyance of the whole property as the vendor can give, paying him the price stipulated, less such deduction as may be just, for the defect.

If, in such a case, the vendees elect to rescind the agreement, *in toto*, they are entitled to be repaid the amount which they have expended in compliance with its terms, in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession, or the recovery thereof by the legal owners.

But if the vendees elect to receive such a title as the vendor can give, with compensation for the defect, they have the right to ask for a judgment to that effect.

The vendor cannot recover the possession of the premises, until the vendees have had an opportunity to make their election, and have it complied with, either by the repayment to them of their expenditures, or by the payment of the sum which shall be fixed as the proper purchase money, upon a tender of a conveyance of the vendor's title.

Purchasers will not be compelled to take a part only of what they agreed to buy as an entirety.

The compensation for the deficiency, in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value

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of the whole property in consequence of defects or incumbrances, and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all, with a conveyance of the residue only.

THIS action was brought to recover possession of a block of ground at New Brighton, Richmond county, and certain articles of furniture which the plaintiff, on the 3d day of March, 1858, contracted to sell and convey to the defendant Peteler, for the sum of \$57,500. The contract provided for the execution and delivery of a deed, conveying a good and sufficient title to the premises, with general warranty and full covenants, on the first day of May, 1860, when the first installment of \$7500 of principal was to be paid, and the balance was to be secured by bond and mortgage on the premises, payable in annual installments of \$10,000 each; interest on the purchase money was to commence on the 1st day of May, 1858, and was to be paid semi-annually; the purchaser was to be allowed to enter into possession as soon as practicable; to insure and keep the building and premises insured, for the benefit of the plaintiff, in the sum of \$20,000, and to improve the premises by building thereon permanent improvements, and expend thereon the amount of \$20,000, within eighteen months, unless prevented by pestilence, and if so, then within one year thereafter. Mr. Peteler accordingly took possession of the premises, and he, or his assigns, within the prescribed period, had expended the required amount in permanent improvements. At the time fixed for completing the contract, the parties met for that purpose, when the defendants claimed that the property was subject to an incumbrance hereafter mentioned, of which the plaintiff was unable to procure the removal, and on this account they refused to take the title that was offered, but otherwise the parties were ready to perform the contract. Upon such refusal this action was brought, notice to quit waived, and the defendants allege, in justification of their refusal to surrender possession, their performance, and the failure of the plaintiff to perform the

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contract, in consequence of his inability to remove or discharge the alleged incumbrance; and they claimed damages to the extent of \$30,000 for the breach of the agreement, in case the plaintiff should recover back his property, or that the plaintiff be directed to convey to the defendants Hober and Hatzfield, (the assignees of Peteler's rights under the contract,) such title as he could make, with a just rebate from the contract price for any defect of title. The action was referred to three referees to hear and determine, who adjudged that, upon the facts found, there was a defect in the title as to a smaller part of the premises; that the plaintiff should convey the other unincumbered portion, with a proportionate rebatement of the purchase money, and that if the defendants, after notice, refused to accept those terms, the plaintiff should recover possession of the property. The defendants did refuse to accept the modified terms, and judgment was accordingly rendered for the plaintiff, as prayed for in his complaint. The incumbrance alleged to exist on the title to a part of the premises agreed to be conveyed, arises from the terms of a covenant contained in a deed in the chain of title executed by Edwin Bartlett and wife to Samuel M. Fox, dated October 30th, 1846, conveying a strip on the southerly side of the block. After the *habendum* to the party of the second part, (Fox,) his heirs and assigns for ever, was contained the following provisions: "And the said party of the second part, for himself, his heirs, executors, administrators and assigns, doth by these presents covenant and agree to and with the said Edwin Bartlett, his heirs and assigns, that neither said party of the second part, nor his heirs nor assigns, shall or will, at any time or times hereafter, build, erect, or construct, or suffer or permit to be built, erected or constructed, any house, building or structure of any kind whatsoever, upon any part of the premises hereby conveyed, whereby or by reason whereof the view or prospect of the bay from any part of the dwelling house of John C. Green, otherwise known as that of George Griswold, situated on the southerly side of

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Tompkins avenue, can, shall or may be obstructed, injured or impaired in any manner or degree whatsoever, unless the said John C. Green, his heirs or assigns, &c. shall previously obstruct, injure or impair the said view or prospects, by building on any other part or parts of the ground now attached to the said dwelling house; and in case of any breach of this covenant, the land hereby conveyed shall be forfeited to the said party of the first part, his heirs or assigns, for the use of the said John C. Green, his heirs or assigns."

It appeared that John C. Green purchased these premises from Thomas E. Davis, and at his request the deed was taken in the name of Edwin Bartlett. No instrument was executed by Mr. Bartlett declaratory of any trust in favor of Mr. Green. Bartlett afterwards executed the conveyance to Fox by Mr. Green's direction. Fox afterwards conveyed the premises to Theodosius O. Fowler subject to this covenant, and Fowler covenanted on his part to fulfill and perform the covenant. Fowler conveyed the premises subject to this covenant to Victor Forgeaud, who also entered into a like covenant with his grantor. Forgeaud at the same time procured a general release and quit-claim of the premises from John C. Green and others, which contained this limitation, "but not intending to affect the restriction as to obstructing the view from the dwelling house of John C. Green," *habendum* in fee, but with a proviso that nothing therein contained "should be deemed or construed as waiving, or in any manner evading the rights of John C. Green, as to the obstruction of the view from his dwelling house, as set forth in the condition, covenant or reservation contained in the deed from Bartlett to Fox."

John C. Green afterwards, by another deed to Forgeaud, reciting the covenant in the deed from Bartlett to Fox, and that he was the person for whose benefit the restriction or covenant was made, released the part of said premises covered by a stone cottage, with a proviso that nothing therein contained should be so construed as to impair his rights, "or the

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operation of the said restriction or covenant as relates to the rest and residue of the said premises," as contained in the deed from Bartlett to Fox. Forgeaud conveyed the premises to August Belmont subject to the same covenant, and Belmont covenanted with his grantor to keep and fulfill the covenant in the deed from Fowler to Forgeaud. Belmont conveyed the premises to Cornelius Vanderbilt, who also covenanted to keep and perform the covenant to be kept and performed by Fox. Vanderbilt conveyed the same premises to Victor De Launay, without covenant or condition touching this restriction or reference thereto, except that for description the deed from Belmont was referred to. The premises have been since conveyed to the plaintiff by several mesne conveyances, none of which made any allusion to this restriction or covenant, a reference to the deed from Vanderbilt to De Launay being made merely for description of the premises granted. Neither party had any actual or other notice of the restriction at the time of entering into the contract of sale, except such as they might be chargeable with by reason of the recording of the deeds under which the title was derived. After the action was commenced, two payments of interest were made by the defendants to the plaintiff upon \$50,000 of the purchase money, the last of which was stated in the receipt to be made and received without prejudice. The payments were credited by the referees in their judgment.

From the judgment entered upon the report of the referees the defendants appealed.

Thomas Nelson, for the appellants. The whole case is resolved into the general inquiry, whether the deed offered would have vested in the defendants that good and sufficient title which is called for by the terms of the agreement. There is no ambiguity in the language of the agreement, nor any reasonable doubt as to its legal requirements. (1.) The agreement calls not only for a deed with warranty and usual covenants, but the title *in fact* must be good and unincum-

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bered, so as to vest an absolute title in fee, without conditions or restrictions in its uses. (2.) The title must not only be good *in fact*, but it must be free from *reasonable doubt*, and from *every cloud* resting upon its title. (10 *Hare*, 1. *Adams' Eq.* 258. 4 *Sandf.* 374.) As observed in the case of *Pyrke v. Waddington*, (10 *Hare*, 1,) and in *Adams' Equity*, 258, "The rule thus stated rests upon the fundamental principle, that every purchaser is entitled to require a marketable title." If either of these defects existed in the title, equity would not decree its specific performance; and if equity would not require its acceptance, the defendants were justified in their objections. (3.) The same result follows if the title is defective to a *part* of the premises contracted to be sold, though good as to the remainder. (*Adams' Eq.* 272. 1 *Meriv.* 26. 15 *Penn. Rep.* 429. 3 *Sim.* 29.) As observed in *Adams' Equity*, 273, "A purchaser cannot be required, against his will, to pay for any thing but what he has bought, nor to take a part only of the estate contracted for, where the other part is a large portion of the entire subject matter, or is in its nature material to the enjoyment of the rest." In some cases, where the title is defective to a part, equity will decree a compensation; but in no case will such compensation be decreed, where the part defective in its title is substantial or material to the purchaser's enjoyment, nor where it constitutes a large portion of the entire purchase. Thomas E. Davis held the absolute title in fee to the whole tract; the plaintiff claims his title, and covenanted to convey it to the defendants. 1. The deed of Davis and wife to Bartlett, September 25th, 1846, conveyed to him a good title to the east part of the lot. 2. The deed of Davis and wife to S. M. Fox, October 14th, 1846, conveyed to him a good title to the west part. 3. The deed of Bartlett and wife to S. M. Fox, October 30th, 1846, conveyed to him the east part, so that the entire premises became vested in Fox. This deed contains this provision: Fox covenanted with Bartlett, for himself, heirs and assigns, not to erect, or

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suffer to be erected upon the premises, any structure or building of any kind, whereby the view or prospect of the bay from any part of the dwelling house of John C. Green shall be obstructed or impaired in any manner or degree whatever. In case of breach, the land is forfeited to said Bartlett for the use of said Green, his heirs and assigns. That provision is in the deeds of S. M. Fox to Fowler, May 9th, 1848; Fowler to Forgeaud, March 2d, 1850; Forgeaud to Belmont, December 31st, 1850; and of Belmont to Vanderbilt, February 12th, 1852. The provision is omitted in the deeds of Vanderbilt to DeLauney, May 15th, 1853, and of De Launey and others to Gibert, February, 1858. But for a description of the premises, express reference is made in all the deeds to the deed of Belmont to Vanderbilt. These parties are therefore chargeable with actual and constructive notice of that covenant and condition, at the time of their purchase. In making that provision, the parties intended to create a binding covenant, for the words of an express covenant are used; they intended to create a conditional estate, for a forfeiture is given for its violation; they intended to create a charge upon the land and to bind all parties to whom the premises should come to that qualified and restricted use and enjoyment, for they bound themselves, their heirs and assigns. This intention of the parties will be carried into effect by both legal and equitable principles. That covenant and condition is binding upon all the parties in the chain of title after the conveyance to Fox, and would have been chargeable on the land, and binding upon the defendants, if they had accepted the deed offered by the plaintiff. (1.) It is binding as a covenant real, running with the land. (2.) If the covenant is personal, and does not run with the land, it is binding, as they purchased with notice of the condition and covenant. (3.) It is binding as a condition, creating a defeasible estate. 1. It is a covenant real, running with the land, and is a charge upon those to whom it is conveyed, who stand in privity of contract or estate. (1 *Smith's Lead.*

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Cas. 140. 3 *Cush.* 442. 2 *Comst.* 394.) In Smith's Leading Cases, 181, 140, it is said: "That whenever the relation of tenure is created by a grant, *all the covenants of the grantee for himself and his assigns, which affect the land granted*, will be a charge upon it, and bind every one to whom it may subsequently come by assignment; with this difference, that while the benefit will pass with the land as its incident, its burden will only, when the relation of privity of estate or tenure, exist." That relation exists between Gibert and those under whom he claims, and would exist with these defendants, if they had accepted the conveyance. Covenants similar to this in character have been held in this state to run with the land as its incident, and are binding upon the assignee. (4 *Paige*, 510. 3 *id.* 254. 3 *Edw. Ch.* 96.) 2. But if the covenant does not run with the land, it is a charge upon it in the hands of those to whom it may be transferred, if they are *chargeable with notice* of the covenant at the time of their purchase. (a.) A purchaser of property from a trustee, with notice of the trust, is chargeable with the trust, and is himself trustee. So a purchaser of land, knowing that his grantor has qualified his ownership, or modified his right, shall be presumed to have contracted for it, subject to that modification, and that the consideration paid and accepted was affected by it. (*Tusk v. Moxay*, 11 *Beav.* 571. *Cole v. Sims*, 23 *Eng. L. and Eq.* 584. 2 *Parsons on Cont.* 512, note.) (b.) The record of the deeds containing this covenant, which are in the chain of the plaintiff's title, is notice to him and his grantees of that provision. At common law the delivery of the title deeds was notice of their contents. (*Berry v. M. Ins. Co.*, 2 *John. Ch.* 603. *Will. on Conv.* 121. *Hill. on Vend.* 255, 398.) (c.) The insertion of this covenant in several of the deeds, and the express reference to those deeds in the deeds where it is not inserted, is notice of the contents of those deeds, and of the covenant. (*Cole v. Sims*, 23 *Eng. Law and Eq.* 588.) 3. The provision is binding as a condition, creating a conditional and de-

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feasible estate. It was liable to be defeated, on the happening of an uncertain event. The parties have expressly provided that the premises shall be forfeited by a non-compliance with the terms of that provision. In other words, that if the premises are not used with that restriction, the right, estate and interest therein shall no longer exist in the grantee under his deed. (*Co. Litt.* 203 b. *Hill. on Vend.* 21, [8], 30, [29]. *Will. on Conv.* 100. *Co. Inst.* 203 b.) It is insisted by the plaintiff that, as a covenant or condition, it is wholly inoperative and void; and that if the deed had been accepted, it would have conveyed an absolute title in fee, free from any restrictions in its use and enjoyment. 1. But as a covenant or condition it is not void, as being reserved to a stranger. (a.) The reservation is made to Bartlett in the deed to Fox, and in the subsequent deed to Forgeaud the condition is made directly to Green, the grantor. Bartlett can enter for condition broken, and can seek his remedy by injunction. The right of Bartlett is not affected because of his conveyance of the land, nor for the reason that he had no interest in adjoining premises. (8 *Pick.* 290. 23 *Eng. Law and Eq.* 588.) (b.) If the reservation had been made directly to Green, it would have been equally valid. Equity will regard such conditions as creating a trust, and will enforce it as such. The premises were purchased and paid for by Green, but the title was taken in the name of Bartlett. As a resulting trust it may be void under the statute, but in his deed to Fox the trust is express for the benefit of Green; and if Bartlett enters for condition broken, he will hold as trustee for Green, and that trust equity will enforce. (1 *Smith's Lead. Cas.* 114.) 2. As a covenant or condition it is not void, as being repugnant to the grant, or inconsistent with its use; nor is it void for its perpetuity. The premises may be used for any purpose, if the view of the bay from Green's house is not obstructed. It was purchased by Fox for a lawn or garden, and the consideration paid and received was for that restricted use. Similar restric-

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tions existed in the cases of *Cole v. Sims*, and *Tusk v. Mozay*, but the court found no difficulty in sustaining the legality of such provisions, though the grantor in each case had no interest in the premises or contiguous lots. (23 *Eng. Law and Eq.* 588. 8 *Pick.* 289.)

The plaintiff cannot sustain this action of ejectment, without first paying or offering to pay the defendants the damages they sustained by the non-performance of his agreement. (a.) The defendants were placed in possession of the premises under their contract of purchase; they have expended over \$20,000 in permanent improvements, which by their agreement they were required and compelled to do to entitle themselves to their deed, and to save the premises from forfeiture. These improvements *create a lien on the land*, and until repaid to the defendants, they are entitled to the possession of the premises. In *King v. Thomson*, (9 *Peters*, 204,) where repairs had been made by a party, under the belief and understanding that the premises were to be conveyed to him, but which was too uncertain to be specifically enforced, it was held "that he had an equitable lien on the messuage for his advances, as against the creditors of the owner, who died insolvent." This lien not only arises from contract, but is created in equity, upon principles of general justice, and extends to cases where the improvements were made *bona fide* and innocently, and a substantial benefit has been conferred on the owner. The same rule is sustained in 3 *Lead. Cas. in Equity*, 92; 29 *Barb.* 212; 1 *Story*, 478; 6 *Maryland R.* 418, 431; 2 *Story's Eq. Jur.* §§ 1234, 1237. When a lien is thus created, and possession of the premises has been taken under the contract of sale, equity will control the exercise of any legal right, and protect the parties in their possession of the premises, until they have been paid their damages and the money advanced for the improvements. In 2 *Hilliard on Vendors*, and *Gans v. Rinshaw*, (2 *Barr*, 34,) it is said that "*A vendee is not bound to restore possession, and give up the contract before he can object to the title in an action*

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for the purchase money. He cannot keep both the estate and the price; but it is the vendor's business, if he finds he cannot make such a title as the vendee is bound to accept, to refund what has been paid, and bring an action of ejectment." This is the rule in Pennsylvania, where the legal and equitable powers of the court are united, as in this state. Until that lien is discharged, therefore, this suit cannot be prosecuted. (2 *Hill. on Vend.* 95, 157, 158. 2 *Story's Eq. J.* § 1237. 2 *Barr*, 34, 295.) (b.) But if ejectment can be sustained, and relief obtained the same as on a bill by the vendor for specific performance, the defendants cannot be compelled to accept a deed of part of the premises, and compensation for the part defective in title. It is not a case for compensation. The purchase was of the entirety, and in such case the purchaser will not be compelled to take an undivided part of it. The object and purposes for which the purchase was made shows that the possession of the entire purchase was regarded as material, and without which the purchase would not have been made. In *Story's Eq. Jur.* § 778, the rule is given, "That a party contracting for the entirety of an estate will not be compelled to take an undivided aliquot part." The same doctrine was held in *Dalley v. Pullen*, (3 *Sim. R.* 29.) The Bartlett lot, which is defective in title, forms too substantial a part of the whole purchase; the deficiency is too great to be supplied by compensation. It is only when a comparatively trifling adjustment is needed to satisfy the equities of the case, that compensation can be made. (2 *Parsons on Cont.* 557. *Sharkelton v. Sutcliffe, De Gex & Smale*, 609.) In *Jackson v. Ligon*, (3 *Leigh*, 161,) a want of title to 209 acres out of 698, was held to be too great a deficiency to be supplied by compensation, although the parcel of 209 acres was separated by a public road from the residue, and all the buildings were on the latter. (3 *Lead. Cas. in Eq.* 88.) In that case, and in this, the deficiency is nearly in the same proportion as to value, and still greater in quantity. (See also 4 *Sandf. Ch.* 525; 9 *Vesey*,

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368; 1 *Sim. & Stu.* 190; 2 *Parsons on Cont.* 557.) In the above cases it was also held that a purchaser was not bound to take an estate of a different tenure from that bargained for—as a conditional or life estate, for an estate in fee, with compensation for the deficiency. If a decree for specific performance, with compensation for the part defective in title, will not be made where the purchase was for the entirety, and the part defective in title is material and substantial, and of a nature and tenure different from that bargained for, then there is manifest error in the decision of the referees in making such a decree. The referees state that the Bartlett lot is “not essential to the use and enjoyment of the other part.” By that finding we are to understand that the other part may be used and enjoyed without the Bartlett lot; but that is far from finding but that the Bartlett lot is material and important in the use and enjoyment of the entire premises, and without which the purchase would not have been made. Without the fact so found, such specific performance, with compensation, will not be enforced, even in cases where it otherwise would be. (*Adams’ Eq.* 272. 1 *Story’s Eq. Jur.* § 777. 15 *Penn. State Rep.* 429. 2 *Parsons on Cont.* 557.) (c.) There is error in the decision of the referees, even if this is a proper case for specific performance with compensation. The defendants have a right to all the title which the plaintiff has to the premises; to that which is held subject to that condition, as well as that which is held in fee. If the court compel them to take the title, they will give them such title as the plaintiff has, and the rule of compensation will be the difference in value of the premises held under a conditional title or subject to that restriction, and its value under the absolute title in fee, as the plaintiff agreed to sell it to them. The referees say that a difficulty exists, if not an impossibility, in making such valuation. That is a good reason why specific performance, with compensation, should not be directed, but no reason why property belonging to a purchaser under a contract of purchase, when its specific performance is

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compelled, should be taken from him against his will and given to another, or the vendor be discharged from the performance of his covenant, so far as he is able to do so. (d.) The principles governing the rights of the parties in this case are not difficult, and are of easy application. In *Story's Eq. J.* § 779, and in 3 *Lead. Cas. in Eq.* 72, notes to *Seaton v. Slade*, the rule is given: "That suits may be brought by the purchaser for specific performance, where the vendor is unable to complete a title to all the property sold. In such case, courts of equity allow the purchaser an election to proceed with the purchase *pro tanto*, or to abandon it altogether." The defendants have complied with all their stipulations, in order to obtain their deed of the premises; they ask the title, the whole title, and nothing but the title they purchased; a title which is good and marketable, free from reasonable doubt, and without restrictions in its use and enjoyment. The plaintiff is unable to procure such a title to a large proportion of these premises, which, in the purposes and object for which the purchase was made, the defendants regard as material and important in the use and enjoyment of the entire premises purchased. Rather than take a part, without the whole, they have elected to abandon their contract of purchase altogether, on repayment of the money advanced for permanent improvements. If the defendants had commenced proceedings to recover their damages, they should previously have offered to surrender the premises on payment of their lien for improvements; but when the plaintiff commences proceedings in ejectment to recover the premises, with all its improvements, he should first offer to carry the contract into effect *pro tanto*, with compensation for damages, or, at the election of the defendants, repay the money paid for improvements. (2 *Barr*, 295.)

If there is error in the decision of the referees in directing a specific performance of the agreement with compensation for that part of the premises defective in title, the remaining inquiry arises, what are the damages which the defendants

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are entitled to recover if this suit can be sustained? (a.) Upon this complaint, and the defendants' answer, the defendants should be allowed the \$20,000 paid for permanent improvements on the premises, with interest. This will be allowed on principles of general equity, whether called for by the agreement or not, if they were made *bona fide*, and in the belief that the premises would be conveyed to them under this contract of purchase. (9 *Peters*, 204. 29 *Barb.* 212. 3 *Lead. Cas. in Eq.* 92.) At law, in an action on a contract for a sale of real estate, it is held in this state, that the rule of damages is substantially the same as it is in the case of an executed sale, that the purchase money paid can only be recovered, and that repairs or improvements voluntarily made, uncalled for by the agreement, cannot be recovered. (*Fletcher v. Button*, 6 *Barb.* 646. *Peters v. McKeon*, 4 *Denio*, 546.) In *Pitcher v. Livingston*, (4 *John.* 19,) the rule, and the reason of it, is thus given by Ch. J. Kent: "Improvements made upon the land were never made the subject matter of the contract of sale, any more than its gradual increase or diminution in value. The subject of the contract was the land as it existed and was worth, when the contract was made." In this case the improvements were made the subject matter of the contract. The agreement required the expenditure in permanent improvements; it was made a condition of sale, as much as the payment of the purchase money. Whatever was paid as purchase money could be recovered, for the contract required its payment. This contract also required this expenditure for improvements, as much as the payment of the purchase money, to entitle the defendants to their deed, and to save the premises from forfeiture. The same rule which allows the recovery of the purchase money, will, for the same reason, sustain a recovery at law for their improvements. In claiming the money expended for improvements, it is not made as an adverse claim, but as an existing equity, which the plaintiff must discharge before he has any right or claim to the possession of the

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premises. (b.) But if the money advanced for those improvements were regarded as an adverse claim, and should be recovered under adverse proceedings, it is then insisted that they should be allowed, under the counter-claim set up in the answer, and established in proof by the defendants in this cause. (*Code*, §§ 149, 150, 274, *sub. 1, 2. Dobson v. Pearce*, 2 *Kern.* 165. *Blair v. Claxton*, 18 *N. Y. Rep.* 529.) The form of the action, though it be *ex delicto*, ought not to affect any rights to which the defendants are entitled under the law of the land as applicable to the facts of the transaction. (*Xenia Branch Bank v. Lee*, 2 *Bosw.* 694.) The referees, in their contingent allowances to the defendants for the value of the Bartlett tract, have themselves recognized the principle upon which the defendants base their right to counter-claim for damages. That is but one form for allowing to the defendants their damages; but as the defendants regard it with disfavor, and they never assented to it, they are unwilling to abide by this mode of making them compensation for the plaintiff's violation of his contract.

The judgment is erroneous at all events in allowing a recovery of the personal property. (20 *N. Y. Rep.* 147.)

H. W. Robinson, for the respondent. I. The referees, by their report and decision, have correctly found the facts, and the plaintiff has been thereby awarded the possession of the property, for the recovery of which this action is brought, and obtained the very judgment which he prayed for. Upon the facts as found, he was, however, entitled to such judgment upon a different ground from that assigned by the referees. For this reason, independent of any other, the judgment should not be disturbed. (*Munro v. Potter*, 34 *Barb.* 358.)

II. The title which the plaintiff tendered to the defendants, in pursuance of his contract of sale, was not subject to any incumbrance, nor was it defective. Upon well established principles of law, it was free from any reasonable doubt as to its validity on account of the covenant or provisions con-

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tained in the deed from Bartlett to Fox, or any of the covenants or provisions in any of the subsequent deeds, and the defendant's refusal to complete the purchase, and still withhold possession, was unjustifiable. As well at common law as by force of our statutes, John C. Green never had any title or interest, legal or equitable, in the premises in question, nor had he any equitable right that was enforceable against them. 1st. The provision contained in the deed from Bartlett to Fox was not a *valid condition*, because apt words to create a condition were not used, nor was there any such reservation contained in the words of the grantor: the only attempt at restriction being contained in the covenant of the grantee. 2d. If the design is disclosed by this, or any of the subsequent deeds, to annex, as an incident to the property, the *covenant* of the owner limiting the right to build upon the property, in such a way as might obstruct the view from the house of John C. Green, such a reservation for the benefit of the property of John C. Green could not be made effectual by covenants between the grantor and grantee of the property in question, either as a *covenant running with the land*, or by way of an *easement reserved to or for the benefit of the property of a stranger*, or upon any other equitable principles. 3d. The grantor having failed to reserve any right in the property in question, either to his own use or for the benefit of any property in which he was interested, any attempt to impose a restriction in the deed upon the right of the grantee, for the benefit of other property in no way connected with it by privity of estate, would be to create a reservation in favor of a stranger, which would be repugnant to the grant, and equally void, either as a condition, covenant, or limitation, as if it had attempted to restrain the owner from aliening or committing waste, or occupying, planting, or improving, or requiring the payment of a sum of money to the grantor, upon any subsequent alienation. 4th. If any such restriction was imposed, it has, under the circumstances of this case, been discharged. (a.) The covenant contained

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in the deed from Bartlett to Fox was not valid as a *condition*. To constitute a valid condition in a deed, it must be in the words of the grantor, by way of exception from the thing granted, and be contained in the *habendum* or granting part of the deed, and must not rest in the covenant of the grantee. (*Co. Litt.* 201 a. *Lord Cornwall's case*, 2 *Coke*, 71. *Com. Dig. tit.* 22, chap. 23, § 4. 2 *Greenl. Cruise*, 730. *Shep. Touch.* 124; 30 *Law Lib.* 239. *Perk. Conv.* 744. *Willard's Real Property*, 101. *Viner's Abr., Cond. D.* 3.) A laxer rule prevails as to leases for years, which are but contracts for the possession. (2 *Greenl. Cruise*, 731, § 9. *Shep. Touch.* 122, 124. *Co. Litt.* 104 a. *Keppel v. Bailey*, 2 *Myl. & Keen*, 517.) The provision in the covenant of the grantee, that "in case of any breach of this covenant the land conveyed shall be forfeited," was merely *in nomine pœna*, or a forfeiture "*in terrorem*," for breach of covenant, and constituted no condition. (1 *Saund.* 387 b, note 16. (b.) But if otherwise, and the deed from Bartlett to Fox contains valid words of condition, they were inoperative in the present case, because, 1st. The condition could only reserve the right of re-entry to the grantor, in the same right and seisin as was his former estate. (*Shep. Touch.* 121. *Cruise Dig. tit.* 13, § 15. *Inhab. of Bangor v. Warren*, 34 *Maine R.* 324. *Nicoll v. N. Y. and Erie R. R. Co.*, 2 *Kern.* 121. 2 *Prest. on Cont.* 201. *Ives v. Van Auken*, 34 *Barb.* 566.) No instrument in writing was ever executed to John C. Green declaratory of any interest *in trust* for him, and he never had any title or interest, legal or equitable, in the premises conveyed by Davis and wife to Edwin Bartlett, by reason of his having advanced the purchase money, and procuring the deed to be made to Mr. Bartlett, under the *parol* understanding that the purchase was to be for his benefit, or otherwise. (2 *R. S.* 134, §§ 6, 7. 1 *id.* 727, § 1. *Id.* 728, §§ 49, 51. *Padgett v. Lawrence*, 10 *Paige*, 171. *Brewster v. Power*, *Id.* 569. *Bander v. Snyder*, 5 *Barb.* 63. *Lathrop v. Hoyt*, 7 *id.* 59. *Garfield v. Hatmaker*, 15 *N. Y. Rep.*

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483.) The title by *reverter* "in trust for the use of said John C. Green, his heirs and assigns," as contemplated by this deed, and attempted to be reserved, was by force of § 51, 1 R. S. 728, different from that absolute estate which previously existed in the grantor. Under the provisions of 1 R. S. 728, § 49, changing the rule of the common law, this attempted "disposition" of the estate in the land would by the terms of the deed *eo instanti* vest the title in John C. Green or his heirs, the *cestui que trust*. (*Lagrange v. Lamoreux*, 1 Barb. Ch. 18.) Even at common law the intention to give the estate to John C. Green would, by such a declaration of a *use*, immediately vest the title by reversion in him as *cestui que use*. (*Burton's Real Prop.* 524. *Haggerston v. Hanbury*, 5 B. & C. 101.) The condition was not a general condition of re-entry, but a special condition of power of entry limited by way of *use*. (*Co. Litt.* 203 a, note 3.) Under the terms of this deed John C. Green or his heirs would alone have any right accruing from re-entry, but being *strangers* to the deed they could take nothing by it, nor could they enforce the right of re-entry. (*Doe v. Lawrence*, 4 Taunt. 23. *Co. Litt.* § 347, 131 a. *Cruise's Dig. tit.* 13, ch. 1, § 15. *Ch. of Brattle Sq. v. Grant*, 3 Gray, 142. 4 *Kent's Com.* 122, 125-7. *Storer v. Gordon*, 3 M. & Sel. 322. 2 *Bl. Com.* 154. *Nicoll v. N. Y. and Erie R. R. Co.*, 2 Kern. 121. *Hornbeck v. Westbrook*, 9 John. 75. *Pollock v. Cronise*, 12 How. Pr. 363.) 2d. There being no right or interest remaining in the grantor, the condition attempted to be imposed for the benefit of a third person was repugnant to the grant, and void as against public policy. It infringed the rules of law against perpetuities, by tending to impede the free circulation of the title to real property, and create embarrassments which were not only injurious to the possession, but tended to public inconvenience. A *reservation* by way of condition is only favored or tolerated when it is made for the benefit of the grantor, or of his other property, or for the use of the public, by way of dedication. (4 *Kent's Com.*

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129-131. 1 *Jarm. on Wills*, 680; 819, *marg.* *Hobart*, 170. *Vin. Abr., Condition A.* [a.] *Newkerk v. Newkerk*, 2 *Caines*, 345. *Depeyster v. Michael*, 2 *Seld.* 493. *Negus v. Schermerhorn*, 1 *Denio*, 448. *Merrifield v. Cobleigh*, 4 *Cush.* 178.) The enforcement of this condition would prevent the erection of any useful building on the premises in question, and make the value of the lands in the hands of the grantee comparatively valueless. (*Depeyster v. Michael*, 2 *Seld.* 498.) The release executed by John C. Green (who had the whole beneficial interest) to Forgeaud of part of the premises from the operation of the condition, was a release of the whole right of forfeiture, although such may not have been intended; because the right of re-entry, given for a breach, was upon the entire premises originally conveyed on condition, and it could not be apportioned. (1 *Hill. on Real Prop.* 388.) (c.) The covenants of Fox, the grantee, in the deed from Bartlett, was not a *covenant running with the land*. Even if a right of entry existed, it was no reversion or other estate. (*Nicol v. N. Y. and Erie R. R.*, 2 *Kernan*, 121.) No privity of estate existed between the grantor and grantee. (*Osterhout v. Shoemaker*, 3 *Hill*, 518. *Depeyster v. Michael*, 2 *Seld.* 467. *Rawle on Cov.* 282; 2d ed. 334. *Averill v. Wilson*, 4 *Barb.* 180. *Bigelow v. Finch*, 11 *id.* 498.) And a covenant assuming to impose a *charge* upon the land of the covenantor, but having no relation to any estate or interest remaining in the covenantee, (whatever right it may confer at law on the person for whose benefit the covenant is created, as against the covenantor personally,) cannot be enforced against the grantees of the covenantor *as a covenant running with the land*. (*Smith's Lead. Cas.* 5th Am. ed. 123, 125, 140, 142, 176, 181. *Weyman's Ex'rs v. Ringold*, 1 *Bradf.* 57. *Parish v. Whitney*, 3 *Gray*, 516. *Plymouth v. Carver*, 16 *Pick.* 183. *Hurd v. Curtis*, 19 *id.* 459.) The utmost to which the courts have gone, in order to uphold any such a charge upon the lands, is where the grantor has by covenant, *reserved some easement* or privilege out of the prop-

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erty conveyed, for the benefit of, and as an appurtenant to, his other *unconveyed estate*. (*Smith's Lead. Cas. 5th Am. ed.* 143, 145. *Hills v. Miller*, 3 *Paige*, 256. *Barrow v. Richardson*, *Id.* 351. *Tusk v. Mozay*, 2 *Phil. Ch.* 774. *Cole v. Sims*, 23 *Eng. L. & Eq. Rep.* 584. *Whatman v. Gibson*, 9 *Sim.* 196. *Mann v. Stephens*, 10 *Jurist*, 650 f; 15 *Sim.* 377.) Or some mutual agreement exists for the improvement of property, (including that of the grantor,) according to some general plan which the covenant promotes, in which case any of the several persons parties to the agreement, or their grantees, may restrain its violation to their prejudice. (*Tallmadge v. East River Bank*, 2 *Duer*, 615. *Brouwer v. Jones*, 23 *Barb.* 153.) 2. Such a covenant, made for the benefit of a third person, or of his property, which is unconnected by title with land of the grantor, or with any such general plan of improvement, is *collateral*, and cannot be enforced by him against the land of the covenantor, or his grantees, either at law or in equity. (*Vyryan v. Arthur*, 1 *B. & C.* 410. *Hornbeck v. Westbrook*, 9 *John.* 73. *Storer v. Gordon*, 3 *M. & S.* 322. *Addison on Cont.* 295, note a. *Co. Litt.* 385 a. *Allen v. Culver*, 3 *Denio*, 284.) 3. Although the covenant made by the grantee "for himself and his heirs, executors and assigns," may have evinced a general purpose thereby to bind the land for the benefit of *the land of a stranger*, such an intention was inconsistent with well established rules of law, and the means adopted were ineffectual to accomplish such an object. (*Doctor and Student*, 67. *Shep. Touch.* 86. *Fairbush v. Godwin*, 5 *Foster, N. H.* 425. *Hunt v. Rousmanier*, 1 *Pet.* 1.) The relations between the parties must be such as to render the intent effectual. (1 *Smith's Lead. Ca. 2d Am. ed.* 123.) 4. To give effect to such a covenant would be "a bold attempt to create new kinds of liability, and new species of estate." (*Keppel v. Bailey*, 2 *M. & K.* 517.) (d.) The several covenants of Fowler with Fox, of Forgeaud with Fowler, of Belmont with Forgeaud and of Vanderbilt with

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Belmont, to perform the covenant of the grantee in the deed from Bartlett to Fox, were, for the same reasons, ineffectual to create any easement appurtenant to the land of John C. Green, and were nothing more than personal covenants, amounting to mere declarations that the property was conveyed subject to the legal force and effect of the covenant in the deed to Fox. (*King v. Whitely*, 10 *Paige*, 465. *Trotter v. Hughes*, 2 *Kern.* 78.) (e.) The conveyance of the property by Fox to Fowler, "subject" to that covenant, was not a recognition or affirmance of its validity, nor an assumption of any such liability. (*Wolveridge v. Stewar*, 1 *Crom. & Mees.* 644. *Belmont v. Coman*, 22 *N. Y. Rep.* 438. *Culver v. Sisson*, 3 *Comst.* 266.) (f.) Neither the assertion in the quit-claim deed from Griffin, Griswold & Green to Forgeaud, in reference to that covenant, that it was not intended to affect "the said restriction," nor to be deemed as waiving or evading the rights of John C. Green, "as set forth in the condition, covenant or restriction" contained in the deed from Bartlett to Fox, nor the recital in the release of the cottage from the covenant, executed by John C. Green to Forgeaud, that "the aforesaid restriction or covenant" was made and reserved for his (Green's) benefit, gave, nor were they intended to give, any additional force or effect to the covenant beyond what it already possessed. That it was *intended* for his benefit is very probable, but if he had any pre-existing right none of these instruments had any effect to affirm them, or to operate otherwise than as a release *pro tanto* to discharge any condition or obligation. The utmost that can be claimed to be matter of *recitals of fact* in these releases is, that the covenant was intended for the benefit of John C. Green; the other statements are conclusions of law as to the character or effect of Fox's covenant. (*Bigelow v. Finch*, 11 *Barb.* 498.)

III. The *condition* being void, and the covenant ineffectual, either as a *covenant running with the land* or *by way of reservation* of some easement, benefit or privilege to any

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other land of the covenantee, there was no charge or incumbrance upon the land in favor of John C. Green which could be enforced upon any other equitable principle. The case repels any imputation of personal knowledge on the part of the plaintiff of any of these covenants, and particularly of the circumstances under which John C. Green had been concerned in vesting the title in Mr. Bartlett's name; but were this otherwise, his knowledge that the previous owner had attempted to create a burthen upon the land inconsistent with the nature of the property, and unknown to the rules of law, cannot bind him by affecting his conscience. (*Keppel v. Bailey*, 2 Myl. & K. 517.)

IV. This action was brought after the plaintiff had offered to convey, and on the defendants' refusal to take, a title which (unless the matters before considered should be held to constitute an incumbrance or cloud upon the title) was unexceptionable. The defendants, after full knowledge of the supposed defect in the title, although refusing to accept a conveyance, still insisted on retaining possession. By their answer, they defend their possession and claim damages in case the plaintiff should recover back the property, or that the plaintiff should convey such title as he could make with a rebate from the contract price by reason of any defect in the title. This latter redress the referees afforded, but it not being accepted, the plaintiff was adjudged to have the right to recover possession. Upon discovery of the alleged imperfection in the title the vendees did not attempt to rescind the contract, but insisted on retaining possession of the property. Even if the title offered them was liable to any just exception, they had no right to hold on to the property and at the same time claim damages for an entire rescission of the contract. If they chose to rescind the contract, they ought to have surrendered possession. As they refused the equitable terms upon which the referees adjudged they might retain possession, the plaintiff was clearly entitled to the judgment awarded him. (*Wright v. Delafield*, 23 Barb.

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498. *Caswell v. Black Riv. Manuf. Co.*, 14 *John.* 453. *More v. Smedburgh*, 8 *Paige*, 600.) 1. They had no lien for the improvements they had put upon the property. 2. No such lien exists in any case on behalf of the vendee, unless the vendor is insolvent. (*Hill. Vend.* 424, § 15. *Eyler v. Crabbs*, 2 *Maryland Rep.* 154. *Richardson v. Stilliner*, 12 *Gill & J.* 477.) 3. If it had existed, it would not have conferred any right to retain possession. 4. The vendee would only be entitled to recover such portion of the purchase money as he had advanced, as if the sale had been *executed*. The improvements he put on the property were in no sense part of the purchase money. Had a deed been executed the \$57,500 would have been its actual consideration, and so much of that sum as had been paid would be the extent of damages recoverable upon any breach of the agreement to convey, or of the deed after it had been executed. *Conger v. Weaver*, 20 *N. Y. Rep.* 140. *Peters v. McKeon*, 4 *Denio*, 546.) 5. No such right of lien is alleged or sought to be enforced by the answer.

V. The referees made a disposition of the case presented by the pleadings most favorable to the defendants. Blending law and equity, they sustained their *defense of the possession* upon the terms asked by the answer, by decreeing a specific performance, and making what they regarded as a just rebate from the contract price for the assumed inability to give a good title. The alternative relief prayed for, to wit, their damages in case the plaintiff recover back said property by reason of his inability or refusal to fulfill said contract, &c., was not the subject of a counter-claim in an action of ejectment, to try the possession-title which was founded upon an alleged continuous *tort* or *trespass*. (*Burns v. Nevins*, 27 *Barb.* 493.)

By the Court, EMOTT, J. The premises to which this controversy relates consist of two parcels; one, the westerly portion, designated in the report of the referees the Hotel

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plat; the other, or easterly part, designated the Bartlett plat. There is no question of the ability of the plaintiff to convey a good title to the former of these. The two parcels were contracted to be sold together, however, and as one piece of land. They are not distinguished in the contract, but Gibert agrees to sell and convey to Peteler, lands in New Brighton lying between certain streets, and including all these premises. The plaintiff's title to the whole property is derived from one Fox. Fox obtained his title by two conveyances. One was from a person named Davis, dated October 14th, 1846, of the Hotel plat. This was an absolute deed, and conveyed a perfect and unqualified title. This Davis was originally the owner of the whole, and his title was absolute in fee. But on the 14th of September, 1846, before his deed to Fox, Davis had conveyed what was afterwards known as the Bartlett plat to Edwin Bartlett. The deed from Davis to Bartlett was absolute, like the other, and contained no restriction. But it appears that Bartlett took this title at the request of one John C. Green, who was the owner of certain adjoining premises which he desired to protect. Green advanced the purchase money, and Bartlett held the title for him, and subject to his direction, although there was no written evidence of the arrangement. On the 30th of October, 1846, Bartlett, at Green's request and by his direction, conveyed the strip of which he thus held the title to Fox, who was already, by Davis' deed, the owner of the residue. This deed of Bartlett contained a provision in the form of a covenant by the party of the second part, (Fox,) his heirs, executors, administrators and assigns, to and with Bartlett, his heirs and assigns, not to erect or permit to be erected at any time thereafter, on any part of the premises, any building whereby the view or prospect of the bay from the dwelling house of John C. Green could be obstructed or impaired, unless Green should first destroy his own prospect by building on his own lot. The deed added a clause of forfeiture in favor of Green in the event of a breach of this covenant. It

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was not signed or executed by Fox. Fox afterwards conveyed to Theodosius O. Fowler, subject to this covenant and to an express stipulation by Fowler to observe it. Fowler conveyed to Victor Forgeaud, subject to the same covenant and stipulation. Forgeaud obtained also a release and quit-claim of title from Green, but with a clause preserving the restriction as to building, &c. At or about this time there was erected a stone cottage upon the Bartlett lot, and Green afterwards by a deed, reciting that he was the person for whose benefit the restriction was imposed, released Forgeaud from the restriction as to the land occupied by this cottage, but with a proviso that this should not remove the restriction or impair his rights as to the residue of the premises. After this, Forgeaud conveyed to August Belmont by a deed containing an express covenant on the part of Belmont to abide by the restrictions in the deed to Forgeaud; this latter deed, however, like the others, not being signed by the grantee. Belmont conveyed to Vanderbilt by a deed in similar terms. From Vanderbilt the title passed to the plaintiff by various mesne conveyances, none of which contained any express covenant or restriction, but all of which referred to the deed from Vanderbilt to his next grantee; which latter deed referred to the deed from Belmont to Vanderbilt which contained the restriction.

Although the plaintiff is not shown to have had express notice of this restriction, yet as the conveyances under which he holds refer to deeds in which it is contained, and these deeds are recorded, he must be taken to have had notice of the existence of such a restriction in the original deeds, and of its consequences.

John C. Green, in whose favor this covenant was made, may be admitted to be a stranger to the legal title, and probably not able to bring an action at law upon the covenant, against the plaintiff, or to enforce it as a condition divesting the legal estate, upon a breach. But the remedy in equity for the enforcement of such a restriction imposed upon land

by the owner, does not depend upon the existence of a concurrent remedy at law. The observations of Lord Brougham in *Keppel v. Bailey*, (2 *M. & K.* 54,) if intended to express such an opinion, are distinctly disapproved by Lord Cottenham in *Tusk v. Mozay*, (2 *Phil.* 774.) In this latter case Lord Cottenham granted an injunction in favor of a vendor, against a subsequent purchaser from his grantee, to enforce a covenant of that grantee as to the use of his own premises, which did not run with the land, and was not contained in the deed to the last purchaser. The case was placed distinctly upon the equity, which it was conceded might have been created as well by an agreement, as by a covenant, provided the subsequent purchaser had notice of it. In *Cole v. Sims* (23 *Eng. L. & E.* 384) the lords justices of appeal affirmed an injunction of the vice-chancellor, in a case very similar to the present, upon the question of notice, and where also there was no remedy at law. So in *Whatman v. Gibson*, (9 *Sim.* 196,) *Schrieber v. Creed*, (10 *id.* 35,) and *Mann v. Stephens*, (15 *id.* 377,) similar agreements as to the use of property were enforced by injunction, in cases where there was no privity between the present parties, and no remedy at law. The principal cases in our own courts are referred to in *Brouwer v. Jones*, (23 *Barb.* 153, 160,) in which a covenant not to use certain premises in a particular way was enforced against a purchaser, in favor of a previous purchaser of lands in the same tract from the same grantor. This was upon the ground that the covenant was intended for the benefit of the owners of the whole tract, and created an easement or servitude in the lands conveyed as a servient tenement, which would be enforced at the instance of any owner of any part of the tract for whose benefit it was created. In the case of *Barrow v. Richard* (8 *Paige*, 351) the plaintiff and defendants were alike purchasers of lots in a particular tract from one Mercein. The plaintiff first purchased lot No. 11 in this block, and the defendants afterwards received conveyances of lots 12, 13. All the deeds contained covenants against cer-

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tain uses of the lots. But the covenant or agreement in the plaintiff's deed would neither have created any legal liability against subsequent purchasers of the lots, nor any privity between them and the first grantor. Yet the chancellor fastened upon the language of the covenants in the subsequent deeds, which were expressed to be for the benefit of the "neighboring inhabitants," and held that every such deed created an equity in favor of all the owners of adjoining lots in the block. This case, as well as *Brouwer v. Jones* which followed it—and both I think are correctly decided—is important to show that the action of courts of equity in such cases is not limited by rules of legal liability, and does not depend upon legal privity of estate, or require that the party invoking the aid of the court should come in under and after the covenant. A covenant or agreement restricting the use of any lands or tenements in favor or on account of other lands, creates an easement and makes one tenement, in the language of the civil law, servient and the other dominant; and this without regard to any privity or connection of title or estate in the two parcels, or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title, to subject one parcel of land to a restriction in its use for the benefit of another; whether that other belong at the time to himself or to third persons, and sufficient language to make that restriction perpetual.

The referees were correct in their conclusion in this case that the Bartlett lot was subject to an easement or servitude in favor of the lands of John C. Green, which was a defect or incumbrance upon the title, so that as to that part of the premises contracted to be sold, the plaintiff was disabled from giving the title which he had contracted for. The question now arises, what are the respective rights and obligations of these parties, under this state of facts. The present is an action of ejectment by the vendor against the vendee or his assigns who were in possession. The defendants having refused the plaintiff's title, cannot of course retain the posses-

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sion of the premises as vendees. But they set up the facts of the contract and the title, and the plaintiff's inability to perform. They also aver that having taken possession under the contract, they expended in good faith a very large sum in permanent improvements, relying upon the plaintiff's ability to perform the contract and to make a good title. They ask a judgment for damages, or that the plaintiff be directed to convey such title as he may have, with a deduction from the contract price for the imperfection of his title. The answer does not indicate an election by the defendants between abandoning the contract altogether, and receiving a partial performance with compensation. The vendee in such a case has such an election, which he may indicate by the form of his action, or where, as in the present case, no objection is taken to the time or the mode of the election, he may be allowed by the judgment an opportunity to exercise it. The defense to the present action has the same scope and effect as a cross action, or suit in equity for performance of the contract, or for the appropriate remedies of the vendee under it, and should result in a similar judgment, upon a sufficient state of facts. The claim for compensation for the expenditures of the vendee is made in this answer in the form of a demand or counter-claim of mere damages at law for the non-performance of the contract. It is not, however, my intention to consider what would be the measure of damages in an action at law, for the failure of the plaintiff to comply with this contract, or to what extent such a counter-claim could be interposed in a suit like the present. The defense may properly be disposed of here in its equitable aspect. The answer asks, as I have already stated, for such a title as the plaintiff can make, with compensation for the defects, or for such other relief as the facts may justify. There is no dispute that expenditures were made by the defendants, as stated in the answer, in permanent improvements, in good faith and relying upon the performance of the agreement, to an amount of about \$20,000. Whether such expenditures could be recov-

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ered back of a vendor who had failed or been unable to make a perfect title, or whether they could be made a lien upon the premises, in a case where the expenditures were not specified or demanded by the contract, is probably an open question in this state. In *Putnam v. Ritchie* (4 Paige, 390, 404) the chancellor declined to make such an allowance for improvements in favor of a purchaser who had made his expenditures for the improvements in good faith, and supposing that he was the owner under a conveyance which turned out to be void. The chancellor refused to stay the enforcement of the legal title until compensation was made for these expenditures, intimating that his opinion would be different in a case where the legal title was in the person who had made the improvements in good faith, and the equitable title in another, who was thus compelled to resort to equity for relief, and would then be required to do equity himself. This case was disapproved by Judge Story in *Bright v. Boyd*, (1 Story's Rep. 478.)

There the owner of an estate was subjected to a deduction in favor of a bona fide possessor, in an action against the latter for rents and profits after a recovery upon a legal title, to the extent of the amount expended in good faith for permanent improvements. The case perhaps does not quite come up to the opinion upon the present point, since the suit was a bill in equity for an account of the rents and profits, and the maxim that he who seeks equity must do equity, might be directly applied, although the foundation of the suit was a legal title. In the case of *King v. Thomson*, (9 Pet. 204,) in the supreme court of the United States, the plaintiffs were the vendees, who filed a bill for specific performance, the legal title being in the defendants. The contract was proved, but it was indeterminate as to the person in whom the title was to be vested, or the conditions of the conveyance. The specific performance was therefore denied, but the vendees were allowed the benefit of their expenditures, and the premises were directed to be sold to repay them.

This case goes farther than the case before Judge Story, and can hardly be reconciled with the opinion of Chancellor Walworth.

There is however a feature in the present case which will distinguish it from those which have been referred to. The contract here called for and required the expenditures which the defendants have made. They have made expenditures not only in good faith, and relying upon the execution of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement. Under such circumstances I cannot hesitate to hold, that the vendor who has been unable to perform the contract, cannot recover the possession of the lands, without repaying expenditures which were made under the stipulations of the agreement itself, by which possession was given, and for his security, if not for his benefit.

I am therefore of opinion that if the defendants elect to rescind this agreement in toto, they are entitled to be repaid the amount which they have expended in compliance with its terms in permanent improvements; and that such amount should be made a lien upon the premises, or its payment a condition to the surrender or recovery of their possession by the legal owners.

If, however, the defendants elect to receive such a title as the plaintiff can make, with compensation for the deficiency, they have the right to ask for a judgment to that effect. The referees, by their judgment, directed that the portion of the premises which has been described as the Hotel plat, and as to the title to which no difficulty arises, should be conveyed to the defendants, and not the residue, and that a deduction of \$17,760 with interest should be made from the contract price of the whole property, for the failure to convey the Bartlett strip. This however is not the performance or the compensation to which the defendants are entitled. The lands contracted to be sold to them were sold and to be conveyed as one parcel. However susceptible of division they

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may be, and although they had been divided in the former history of the title, yet the purchase was entire, and the defendants are not to be compelled to take a part only of what they agreed to buy as an entirety. The compensation for the deficiency, in cases where performance is decreed in part, consists in an abatement from the price, for the diminution in value of the whole property in consequence of defects or incumbrances, and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all, with a conveyance only of the residue. There are indeed some cases to be found in the books of a partial performance decreed, by a conveyance of a portion only of the property and a consequent abatement of price, but they will be found to be cases where the premises sold consisted of distinct parcels, purchased separately, and having distinct prices. (2 *Sandf.* 298. 6 *John. Ch.* 38.)

The conclusions of the referees in this case as to the remedies to which these parties were entitled, were erroneous. The defendants are entitled to elect whether they will rescind the contract in toto, and receive back their expenditures under it, or will receive such a conveyance of the whole property as the plaintiff can give, paying him the price stipulated, less such deduction as may be just for the defect occasioned by the covenant in favor of John C. Green. The plaintiff cannot recover the possession of the premises until the defendants have had the opportunity to make their election, and have it complied with, either by the repayment to them of their expenditures, or by the payment of the sum which shall be fixed as the proper purchase money; upon a tender of a conveyance of the plaintiff's title.

The judgment is reversed and a new trial ordered at the circuit. The costs will abide the final direction of the court.

[KINGS GENERAL TERM, December 8, 1862. *Emott, Lott and Brown, Justices.*]

BROOKS and CUMMINGS vs. PECK.

An action may be brought by preferred creditors in an assignment for the benefit of creditors, in behalf of themselves and other creditors of the assignor, against the assignee, for an accounting, and to obtain a judgment that the defendant close up his trust by converting the property into money and distributing the same under the assignment; where the creditors are so numerous that it would be impracticable for the plaintiffs to bring them all before the court.

A hostile interest which will prevent the joining of parties as plaintiffs, within the meaning of the cases, occurs when the plaintiff makes a claim which is antagonistic to the claim of another.

It cannot occur when the legal rights of the parties are the same, and the only question is as to the expediency of having those rights enforced at a particular time; unless as to some of the parties, it is expedient that the rights should be enforced at one period, while as to others it is expedient that they should be enforced at another period.

Where the right to have the assigned property converted into cash is common to all the creditors, the only question being as to the time when it shall be done, there is no antagonism.

A mere difference of opinion, among the creditors, as to the best time for disposing of the assigned property, does not constitute a hostility of interest.

Where assigned property consisted in part of real estate, occupied as a ship yard, which the extension of an avenue had rendered unsuitable for that purpose, and the property was not likely to be purchased by any one for that use, but it was suitable for other purposes; there being no present prospect of a rise in value, and the creditors not all agreeing to allow the assignee further to continue his efforts to sell the property at private sale; *Held* that it was a proper case for directing the assignee to sell the property at public auction, if not sooner sold at private sale.

THIS was an appeal from a judgment entered upon the report of a referee. The material facts are fully stated in the opinion of the court.

N. Dane Ellingwood, for the appellant.

E. More, for the respondents.

By the Court, BARNARD, J. The plaintiffs are preferred creditors in a general assignment made by William H. Brown, to the defendant, for the benefit of his creditors. The action

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is brought to obtain an accounting, and to obtain judgment that the defendant close up his trust by converting the property in hand into money and distributing the same under the assignment. The complaint alleges that the action is brought as well on behalf of the plaintiffs as on behalf of all the other creditors of William H. Brown who were such creditors at the time of the assignment, and still are. It is then alleged that there are a large number of such creditors, and except the preferred creditors the plaintiffs have no means of knowing who the creditors are, or their number; but they are informed and believe that they are very numerous, and that it would be impracticable and inconvenient to make them all parties, in any other way than by suing on behalf of all.

An answer having been put in, the cause was referred. The referee, on the 27th of June, 1859, made his report, whereby he found as matter of fact (among other things) that there were thirteen preferred creditors; that the creditors of Brown were so numerous that it would have been impracticable for the plaintiffs to have brought them all before the court; that the assignor owned certain real estate which at the time of the assignment was occupied as a ship yard, but that the extension of avenue D has rendered it unsuitable for a ship yard, and that said property is not likely to be purchased by any one for ship building purposes; but that it is suitable for a coal, brick or lumber yard, and for manufacturing and commercial purposes; that the creditors do not all agree and the plaintiffs do not agree to let the assignee further continue his efforts to sell said property at private sale, and that there is no present prospect of such a rise in the value of the property as to warrant longer holding on to it. And the referee found as matters of law that the assignee should proceed to sell the property at public auction, if not sooner sold at private sale. Upon this report judgment was entered, simply directing the assignee to sell this property at auction, and giving some special directions

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as to the sale. To all the above findings of fact, as well as the findings of law, the defendant excepted. The point made by the defendant on this appeal is that this is not an action which can be brought by one creditor on his own behalf and on behalf of all others, but that all the creditors must be parties either defendant or plaintiff. And it is urged that a plaintiff can only be permitted to exhibit a bill on behalf of himself and others, in cases where the persons in interest are too numerous and their interests are not hostile.

The complaint alleges, the referee finds, and the evidence fully supports the finding, that the persons in interest are too numerous to be made parties.

Now as to the hostility of interest; a hostile interest, within the meaning of the cases, occurs when the plaintiff makes a claim which is antagonistic to a claim of another. It cannot occur when the legal rights of the parties are the same, and the only question is as to the expediency of having those rights enforced at a particular time, unless as to some of the parties it is expedient that the rights should be enforced at one period, while as to others it is expedient that they should be enforced at another period.

In the present case, the right to have the assigned property converted into cash is common to all the creditors; here there is no antagonism; the only question is as to the time when it should be done. This of course depends upon the question as to when it will produce the most; and here the interests of all the creditors are again identical; since it is obvious that all are alike interested in having the fund as large as possible. A mere difference of opinion as to the best time for disposing of the property does not constitute a hostility of interest. But granting that such a difference of opinion is a hostility of interest, then it is clear that the creditors must be divided into two classes; those who think a sale at the present time advisable, who are represented by the plaintiffs, and those who think a sale should be deferred, who are represented by the defendant. And it is also certain that no one creditor

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has any special claim or interest which is not represented either by the plaintiffs or defendant. These views are consonant with the principle of representation. (*Hubbard v. Eames*, 22 Barb. 601, 602, 603.)

This action being in substance to carry into effect the assignment, it was necessary that the creditors should be parties. (*Wakeman v. Grover*, 4 Paige, 33.) They were too numerous to be made parties by name, but by the course pursued they are all made parties either through the plaintiffs or defendant.

There was no more reason for making the preferred creditors parties by name than for bringing in all the others in the same manner. The preferred creditors have no other interests, different or greater, than the other creditors, in the sale of the property. Their preference only entitles them to be paid first; thus making it in fact more essential (if any thing) to the other creditors that the property should bring the utmost price.

The great litigation at the trial was as to the time when the ship yard should be sold. Upon this question the court is well satisfied with the conclusion to which the referee has come.

Judgment affirmed with costs of appeal to both parties, to be paid out of the fund.

[NEW YORK GENERAL TERM, December 18, 1862. *Ingraham, Clerks* and *Barnard, Justices*.]

MARY TISDALE vs. JOHN JONES and others.

Judgments recovered against husband and wife during coverture and for a cause of action accruing after marriage, will not bind the wife's separate estate.

A contract entered into between husband and wife, before marriage, although void at law, will be recognized and enforced in equity.

Although an ante-nuptial agreement still rests in covenant, equity will enforce it; treating as done that which the husband agreed to do; and this even against creditors and purchasers.

By an agreement executed prior to marriage, and in contemplation thereof, the husband, for himself and his heirs, covenanted with a trustee of the wife that if the marriage should take place, he and his wife would convey, settle and assure certain premises, the separate estate of the wife, to the trustee, for the use and behoof of the wife for and during her life; and if she should die leaving heirs of her body, then the premises should go to the use of the husband for life, and then to the heirs of the wife's body. If the wife should die within ten years without heirs of her body living at her death, then one half of the premises should go to the husband, and the other half to the wife's collateral relatives. But if the wife should not die, and should not have heirs of her body living, within ten years, and the husband should survive, then the whole premises should go to him for life, remainder to the wife's heirs. No conveyance pursuant to this covenant was ever executed. A judgment being recovered against husband and wife, for work and labor done upon the separate estate, the premises were sold by the sheriff upon an execution issued thereon.

Held that, in equity the husband had no equitable interest in the premises, although there was an apparent legal interest in him. And that it was in the power of the court to control the judgment, so as to protect the interests of the wife against the husband and all others claiming under him, with notice of the wife's rights.

Held, also, that the title of the husband being *prima facie* valid, a sale of the premises upon an execution issued on the judgment, followed by the sheriff's certificate of sale, transferred to the purchaser an apparently valid title, to protect herself against which the wife must commence an action and establish the ante-nuptial agreement. That this created a *cloud on the wife's title*, which a court of equity would interfere to remove.

THIS was an appeal from a judgment entered on the report of a referee, dismissing the plaintiff's complaint, and from an order of the special term charging the plaintiff's separate estate with the costs of the suit. The facts are fully stated in the opinion of the court.

Tisdale v. Jones.

D. Tisdale, for the appellant.

J. W. Breed, for the respondent.

By the Court, MULLIN, J. The plaintiff became owner of the property in question in February, 1839, and was married to Daniel Tisdale in 1845. Before the marriage, and in contemplation of it, the plaintiff, the said Daniel Tisdale, and Jonathan Hurlburt as trustee for the plaintiff, entered into an agreement in writing under seal, wherein the said Daniel, for himself and his heirs, covenanted with said Hurlburt that if the marriage should be solemnized he and the plaintiff would convey, settle and assure said premises to the said Hurlburt, to the use and behoof of the plaintiff for and during her natural life; and if the plaintiff should die leaving heirs of her body, then said premises should go to the use of said Daniel during his life, and then to the heirs of the plaintiff's body. It was also provided that if the plaintiff should die within ten years, without heirs of her body living at her decease, then one half of the premises should go to said Daniel and the other half to the plaintiff's collateral relatives. But if the plaintiff should not die and should not have heirs of her body living, within ten years, and said Daniel should survive, then the whole premises should go to him during his life, and at his death to the plaintiff's heirs. No conveyance pursuant to the covenant was ever executed. The trustee named in the agreement died in 1849 or 1850. On the 23d of January, 1850, the defendant Jones recovered a judgment for \$21.82 damages and costs, before a justice of the peace, against the plaintiff and her husband, in an action for work and labor done on the plaintiff's premises, on the employment of her husband, after the marriage. On the 4th of February, 1856, a judgment was recovered against the plaintiff and her husband, in an action against them, before a justice of the peace, on the aforesaid judgment, for \$33.11, damages and costs. An appeal was taken, in the last men-

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tioned action, to the county court of Oneida county, and the judgment was affirmed, with \$47.60 costs. On the 8th of January, 1858, an execution was issued on said judgment to the sheriff of Oneida, and the said sheriff, by virtue thereof, sold the premises in question to the defendant Downer, for \$59, and gave him a certificate of such sale as required by law. The plaintiff commenced this action to set aside this certificate as a cloud on her title, and to strike her name from the record of the several judgments rendered against her. The referee dismissed the complaint with costs, and afterwards the special term, on motion, charged the costs on the plaintiff's separate estate, and from this judgment the appeal is brought.

The judgments before the justices of the peace and county court having been recovered during coverture, and for a cause of action accruing after marriage, did not bind the wife's separate estate, and hence her lands could not be sold upon them. The marriage being prior to the passage of the act of 1848, the husband became entitled to a life estate in the premises, unless the ante-nuptial contract defeats it. Laying this contract out of view, for the present, the life estate of the husband was bound by the judgments and liable to be sold to satisfy them.

The question then is, as to the effect of the ante-nuptial contract upon the husband's interest in the land. If that contract is valid and binding, then the husband has no interest that could be sold on the judgments; but on the other hand, if that contract is invalid, then the husband had an interest which was liable to execution, and was properly sold. It cannot be doubted at this day that a contract entered into between husband and wife before marriage, although void at law, will be recognized and enforced in equity. Justice *Story*, in his *Commentaries on Equity Jurisprudence*, § 1370, says: "An agreement entered into between husband and wife before marriage, for the mutual settlement of their estates, or of the estate of either upon the other, upon the marriage, even

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without the intervention of trustees, will be enforced in equity, although void at law; for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract. On this ground, where a wife, before marriage, gave a bond to her intended husband, that in case the marriage took effect she would convey her estate to him in fee, the bond was, after the marriage, carried into effect in equity, although it was discharged at law." (*Id.* §§ 1371, 2. *Connel v. Buckle*, 2 P. Wms. 242.) In 2 *Roper on Husband and Wife*, 179, it is said: "The principle applicable to the present case seems to be this; that the agreement having been made before marriage, at a period when the wife was able to contract, and as it clearly appears to have been the intention of the parties that the wife should reserve to herself a power over her own lands during the coverture, she therefore, and the persons claiming under her appointment, have a right to the interposition of a court of equity, to give full effect to the marriage agreement, and to remove any obstacles which in point of form, or otherwise, invalidated the appointment at law; *the more especially since the wife might have obliged the husband to concur in a fine and settlement of the estates, pursuant to his engagements, which a court of equity, according to its well known practice, will consider to have been performed.*" (*See id.* 181; 2 *Story's Eq. Jur.* §§ 790, 791; *Dillon v. Dillon*, 1 *Ball & Beat.* 89.) In *Campion v. Cotton*, (17 *Vesey*, 264,) a bill was filed by a creditor of J. L. deceased against his executor and his widow, to set aside certain deeds and conveyances from the testator to said Charlotte. The wife relied on a settlement made in contemplation of marriage. The master of the rolls says: "I apprehend it to be clear that the husband not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He has expressly covenanted so to do, and the marriage was a sufficient consideration for the promise." In note 2 to the last

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case it is said "a settlement by a man previous to his marriage and as an inducement thereto would, if no actual fraud were shown, be sustained even against purchasers, for the wife, in such a case, would be a purchaser for herself and her children." Cases to the same effect might be multiplied indefinitely, but these are sufficient to show that although the ante-nuptial agreement still rests in covenant, yet equity will enforce it, treating as done that which the husband agreed to do, and this too even against creditors and purchasers. It follows that in equity the husband had at the time of the recovery of the judgments no equitable interest in the premises, although there was an apparent legal interest. It is in the power of the court to control the judgments, so as to protect the interest of the wife against the husband and all others claiming under him, with notice of the rights of the wife. The lien of a judgment creditor is always subservient to the equities existing against the debtor.

The next and only remaining question is whether the sale and certificate created a cloud on the plaintiff's title, so as to require the interference of the court to protect it.

When a conveyance or other instrument, which is alleged to cast a cloud on the title, is void on its face, or defective for want of preliminary proceedings which the party claiming under it would be bound to *show*, the court will not interfere, as no cloud is cast on the title to the prejudice of the owner. But when the conveyance causing the cloud is *prima facie* valid, the injured party must furnish proof to remove it. Then a cloud is created within the meaning of that term in a court of equity, and it will interfere to remove it. (*Scott v. Onderdonk*, 4 *Kernan*, 9.)

The title of the husband being *prima facie* valid, to the premises in question, the sale and certificate, and the deed in pursuance of the sale, will transfer to the purchaser an apparently valid title, and the plaintiff, to protect herself against it, must commence an action and establish her ante-nuptial

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agreement. She brings herself, therefore, clearly within the case to which I have referred.

The complaint was properly dismissed as to the defendant Breed. There is no reason shown for making him a party. He neither has nor claims an interest in the judgments or purchase at the sale. He acted merely as the attorney for Jones, and in that capacity cannot be liable in this suit.

For these reasons I am of the opinion that the judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed as to all the defendants except Breed, and a new trial ordered. As to Breed, the judgment affirmed with costs of trial as upon a demurrer.

[ONONDAGA GENERAL TERM, JANUARY 3, 1860. *Allen, Mullin and Morgan*, Justices.]

DANA, receiver &c. vs. MUNRO.

There is a wide distinction between the liabilities of those who give notes to form the capital stock of a mutual insurance company and of those who give notes for premiums, after the stock is made up and the company brought into existence. While the former class are liable on their notes, irrespective of losses, the latter are liable only for the *pro rata* share of such losses, in common with all other available premium notes held by the company.

An individual taking a policy of insurance and giving his promissory note to the company, for the premium, cannot be made a stockholder, and liable for the full amount of the note, when he neither knows that he is assuming any such obligation, nor intends to assume it.

The agent of an insurance company about to be organized applied to the defendant's agent to insure the buildings of the defendant in the company, when it should be in a situation to do business; saying that it was not yet organized, but soon would be. Subsequently, after the company was authorized to receive applications, the request to insure was renewed, and acceded to by the defendant, who made an application, and gave a note for the premium; without any intimation being given that any obligation was

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sought or intended other than that incurred by every person insuring in a mutual insurance company. *Held* that the note could not be treated as a stock note, and collected without any assessment.

APPEAL from a judgment entered on the report of a referee. The action was brought by the plaintiff as receiver of the Farmers' Insurance Company, of Oneida county, to recover the amount of a note given by the defendant to said company, a corporation duly created under the general laws relating to the incorporation of insurance companies, and which note was claimed by the receiver to be a stock note, and on which he claimed to recover without proving any assessment to have been made. The defendant insisted it was a note given as a premium note, and that no recovery could be had until an assessment had been duly made.

It was proved on the trial that in the spring of 1851 the defendant was owner of a block of stores in the village of Jordan, in the county of Onondaga. Silas Mann was agent of the Farmers' Insurance Company, above named, which at that time was not fully organized, but was in process of organization. Mann, as such agent, prior to June, 1851, applied to one Knowlton, agent of the defendant, to insure said stores in the company. After consultation with the defendant, Knowlton informed Mann that he would insure the stores in said company, and an application and note were prepared and signed by the defendant, in June, 1851, and the application was approved by the company July 1, 1851, and a policy issued, whereby the risk commenced on the 24th of June, 1851, and was to continue for one year.

The note was in the words and figures following, viz :

"\$320. For value received in policy No. 87, dated ----- 185--, issued by the Farmers' Insurance Company of Oneida county, ---- promise to pay the said company, or their treasurer for the time being, the sum of three hundred and twenty dollars, in such portions and at such time or times as the directors of said company may agreeably to their charter and by-laws require.

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This note, with others, was submitted by the company to the commissioners appointed by the comptroller pursuant to the provisions of the general law for the incorporation of insurance companies, as one of the capital stock notes of said company, and said commissioners thereupon gave the certificate required by said general law, and thereupon the company became incorporated.

Mann and Knowlton both testified to the making of the application to insure in said company, to Knowlton, and the assent of the defendant to insure, but they did not agree as to whether it was understood at the time of such application that the company was not incorporated.

It appeared by the evidence that Knowlton understood that the company was duly incorporated, at the time of the application, and that the proposition was to give the note as a premium note and not as a capital stock note. And it is not claimed by Mann that the note was applied for as a capital stock note. The company was authorized to commence business on or about the 26th of June, 1851.

The referee reported in favor of the plaintiff for the amount of the note and interest, and from the judgment entered upon his report the defendant appealed.

W. Porter, for the appellant.

P. Gridley, for the respondent.

By the Court, MULLIN, J. The Farmers' Insurance Company, of which the plaintiff is receiver, was organized under the general law for the incorporation of insurance companies, passed April 10, 1849. The charter prepared and filed in the comptroller's office, pursuant to the 3d section of that act, fixed the capital of the company at \$100,000, with the right to increase it by adding, as I infer, \$50,000 cash capital, pursuant to the 21st section of the general act. By § 4 of that act it was provided that it should

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be lawful for persons associated for the purpose of organizing any company, after having published the notice and filed their declaration and charter in the comptroller's office, as required by § 3, to open books to receive propositions and enter into agreements to the extent and in the manner specified in § 5. That section provides that no company out of the counties of New York and Kings shall commence business until agreements have been entered into for insurance, the premiums on which shall amount to \$100,000, and the notes received therefor shall be payable at the end of or within twelve months from date, which notes shall be considered part of the capital stock and shall be deemed valid, and shall be negotiable and collectible for the purpose of paying losses which may accrue, or otherwise.

The 11th section of said general act provides that the charter shall be submitted to the attorney general, and if approved by him, the comptroller is required to cause an examination to be made by himself or three disinterested persons appointed by him, who shall certify under oath that the company has received and is in the actual possession of the capital premiums, or engagements for insurance, as the case may be, to the full extent required by § 5. Copies of such certificate are then to be filed in the office of the secretary of state, who is then required to furnish the company with copies of the charter and certificates, which, on being filed in the office of the county clerk of the county in which the company is located, shall be their authority to commence business and issue policies.

By the 9th article of the charter of the company the capital was to be at least \$100,000, consisting of premium notes and premiums received, and in addition thereto such sum as may be added under the provisions of the 2d article. The 2d article provided for adding to the capital \$50,000 or more, to be managed separately from the mutual business of the company.

The 11th article provides that the directors may, in their

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discretion, divide applications into two or more classes according to the degree of hazard, and the premium notes shall not in such case be assessed for the payment of any losses, except in the class to which they belong.

The court of appeals has held that the makers of notes given to form the capital of a company, under this law, are liable for the full amount of them, whether the *pro rata* share of the losses and expenses would equal or fall short of the amount of such note; that it is in the power of the directors to negotiate such notes; and that the holder may enforce payment, whether losses have or have not occurred. (*White v. Haight*, 16 N. Y. Rep. 310.)

There must be, I conclude, a wide distinction between the liabilities of those who give notes to form the capital stock and of those who give notes for premiums, after the stock is made up and the company brought into existence. While the former class are liable on their notes irrespective of losses, the latter are liable only for the *pro rata* share of such losses in common with all other available premium notes held by the company.

If the foregoing is a correct exposition of the intention of the legislature that framed the act of 1849, it is quite important to the applicant for insurance to know whether he is becoming a stockholder in the company, or whether its capital has been made up and the company authorized to commence business. The case before the court presents the question whether a party can be made a stockholder and liable for the full amount of his premium note, when he neither knows that he is assuming any such obligation nor intends to assume it.

Silas Mann was the agent of the insurance company, through whom the note in suit was obtained. He was called as a witness, and testified, in substance, that in June, 1851, he applied to Knowlton, the defendant's agent, in regard to getting the defendant's property insured; talked with him about this company, and told him (K.) that he (M.) was ap-

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pointed agent of the Farmers' Insurance Company of Oneida county, and that he would like to take his application when the company was ready to receive it; told him the company was not then organized, but would be in a short time. On the day the application was made, Mann told Knowlton the company was ready to receive applications.

Knowlton was sworn, and testified to substantially the same matters, except that he understood the company was organized. This was all the evidence bearing on this branch of the case, except that the note was presented to the persons appointed by the comptroller to examine the notes, as a part of the capital, and was estimated and certified as such.

Upon the evidence of the agent of the company it is impossible, it seems to me, to say that the defendant was made to understand that he was desired to become a stockholder in this company; or that he intended to become such. On the contrary, the application to the agent was to insure the buildings in the company, when it should be in a situation to do business; that it was not then, but soon would be; and when it was authorized to receive applications, the request to insure was renewed. The defendant, on this evidence, was not left to ascertain the responsibilities he was taking on himself, as he might be said to be if nothing more had been said than that the company was not yet organized. But he was actually misled. The proposition was not made to insure until the company was authorized to enter into a binding contract of insurance. If Mann understood that he was applying for subscriptions to the capital stock, or if the company intended to have him obtain subscribers to the stock, why were not "*Books to receive subscriptions*," provided for and contemplated by the last clause of section 4 of the general act, furnished to him, and by him to the defendant's agent? There was no intimation given by any person that any obligation was suggested or desired other than that incurred by every person insuring in a mutual insurance company.

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To make a valid contract, the minds of the parties must meet. They must both intend to enter into the engagement expressed by the terms of the contract. When this element is wanting, there is no contract made. I am satisfied the defendant never intended to become a subscriber for the stock of this company; and I am also satisfied that if the company intended that their agents should obtain subscriptions for stock in the manner it was done in this instance, they deliberately intended to cheat the persons applying for insurance. A contract thus obtained should be declared void.

It may be that upon an assessment for losses, the defendant will still be liable to the extent of his note; but if so, he will be charged in conformity with the terms of the contract entered into by him with the company.

In this view of the case it is unnecessary to examine the other questions raised on the trial.

The judgment must be reversed, and a new trial ordered; costs to abide the event.

Judgment reversed and new trial granted.

[ONONDAGA GENERAL TERM, January 8, 1860. *Allen, Mullin and Morgan, Justices.*]

THE NEW YORK AND NEW HAVEN RAIL ROAD COMPANY
vs. ROBERT SCHUYLER and others.

A corporation is liable for the acts of its transfer agents in issuing false certificates, and allowing false transfers, and for negligence on the part of the corporation, and its officers, in permitting transfers of spurious stock to be made on the books of the company, to persons desirous of becoming stockholders therein.

Permitting its books to be used for the purpose of committing frauds on others who are desirous of purchasing stock; issuing to such persons certificates of stock; and informing buyers who apply for information in regard to stock, before they pay for it, that stock has been transferred on the books,

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when it has not, are also acts for which a corporation should be held responsible.

So a corporation is liable to respond in damages for any loss sustained either by the *fraud* or the *negligence* of its officers or agents in discharging the particular duty assigned them; as where a company is bound to keep transfer books for the purpose of transferring stock, and on being applied to by persons about to purchase stock in the company, to know whether shares have been transferred to them, the officers and clerks give the information that shares have been transferred, and also give the certificate thereof; on which statements money is paid; when in fact no money has been paid, and the party making the transfer had no stock to his credit, to dispose of.

A plaintiff is never required to do equity in order to obtain equitable relief, in any other matter than that in which he seeks to obtain it; and then he is to do equity by restoring to the party whatsoever he may have received from him in the transaction sought to be set aside. The rule requiring a party seeking equity, to do equity, does not apply to a case where damages may be recovered for the injury.

Where the capital stock of a corporation is limited by its charter, to a certain number of shares, it is not in the power of the board of directors, by any resolution or act of such board, to increase the number of shares beyond that amount.

Neither can they delegate to their agent, either directly or indirectly, authority to make such increase. Nor will any act of negligence or misconduct, on the part of such agent, effect, by any liability for such acts, what the corporation could not do directly.

Consequently, the doctrine of *estoppel* cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in an answer to a claim to such stock, that the same is void, as being issued in excess of the capital.

No one can be estopped from refusing to do an illegal act; but an estoppel can only operate in favor of a party injured, where there is no provision of law forbidding the party against whom the estoppel is to operate from doing the act which is sought to be carried out through its operation.

The doctrine of *estoppel* is only available to the party for whom it was designed, and does not operate in favor of a stranger to whom the representation was not made.

No legal title passes to any one who receives from the owner a certificate of shares of stock, issued by a corporation, with a transfer indorsed thereon, and a power of attorney to transfer the same, even though the person to whom such stock was delivered advanced money on the receipt thereof. But the party receiving the same only acquires an equitable title, valid against the party named in the certificate, to compel a transfer of such shares on the books of the company, while the same remains in his name thereon.

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By the law and by the statute of Connecticut, passed in 1849, such an assignment is not valid against any but those making it and their representatives; and such law operates upon all transfers of the stock of the company, whether made in Connecticut or New York.

A transfer on the books of the company, for value, to a *bona fide* holder, will pass to him the shares so transferred, although at the time the transferror had a certificate in his name outstanding for the same, which he did not surrender at the time of the transfer.

The fact that the owner has pledged the certificate to a third party, as security for money borrowed, without notice to the company thereof, will not affect such transfer, or the title of the transferee, to the stock so transferred.

A transfer by a person who, at the time, holds no shares on the books of the company, passes no title to any shares of stock in the company.

Such a transfer conveys no title to stock subsequently acquired, and cannot be made good by a transfer to the person making the same, of subsequently acquired stock.

Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfer may be such as to make the transfer by the transferror appear earlier than the transfer to him; unless it is proven that such transfer was made prior to the one by which the stock was assigned to the transferror.

The by-laws of a corporation, requiring a surrender of the certificate before making a transfer, are not binding on third persons, so as to affect their rights, or deprive them of their property.

Where stock is transferred under a power of attorney attached to a certificate, which power also contains an assignment of the shares, and authority to transfer such shares, the power will not authorize the transfer of any share acquired after the date of the power.

Such transfer can only operate to transfer stock held by the person named in the certificate and power, at the date of the power; and if such stock was previously transferred by him, no title will pass, under the transfer of the attorney, to any stock subsequently acquired by such person.

In the case of a certificate and power of attorney held by the party to whom it has been pledged, without making a transfer on the books of the company, the same rule should be applied. Such certificate and power will give to the holder an equitable title to any valid stock held by the person named therein, at the date of the power, if he continues to hold such stock; but if all the stock held by the party at the date thereof has been sold by him, then the certificate has ceased to be of any value, and should be canceled.

Where a corporation has permitted its agents to sell stock covered by certificates when there was stock standing to its credit sufficient to cover such certificates, it is bound to make good such certificates to the extent of any shares owned by the corporation, within the capital stock of the company;

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and the shares of stock unsold should be applied to the satisfaction of the oldest outstanding certificate of that character.

Persons who have received transfers of spurious stock in a corporation by the acts of its transfer agent, or certificates of spurious stock from such transfer agent, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action.

Parties who have been misled by the acts or negligence of the officers of a corporation, and have advanced money in consequence thereof, are entitled to recover damages against the corporation, in a proper action.

And persons holding certificates of stock, valid when they were issued, accompanied by an assignment and power, on which they have advanced money, may recover damages against the corporation when such certificates have been rendered of no value by the allowance of transfers on the books of the company, without requiring the surrender of the certificates.

In such an action it is not necessary that all the persons holding spurious shares of stock should be made defendants.

Rules for the separation of the stock, in such an action.

THIS action was brought by the plaintiff for the purpose of ascertaining whether the stock held by the defendants in the New York and New Haven Rail Road Company was spurious, either in whole or in part, and if so, to have the same declared void, and ordered to be canceled; and to enjoin the defendants from prosecuting any actions then pending against the company, or bringing actions to enforce any claims founded upon such stock. Such of the defendants as answered denied that their stock was spurious, and set up various grounds on which they claimed their stock to be valid, and in many instances set up counter-claims for damages against the company.

The action was tried at a special term, before the court, without a jury. The material facts are set forth in the following opinion; particularly in the findings of fact therein.

Wm. Curtis Noyes, Wm. Tracy and Charles Tracy, for the plaintiff.

D. Lord, F. B. Cutting, W. M. Evarts, John E. Burrill, Wm. Bliss, J. Larocque, — *Rutherford* and others, for the defendants.

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INGRAHAM, J. In disposing of this case, the main question arises as to the proper rules to be adopted in order to ascertain which stock is valid, and which is spurious. On the part of the plaintiffs, it is claimed that no transfers are to be recognized but such as are entered on the books of the company; that the issue of a certificate of stock, or an assignment thereof, did not vest in any person other than the holder on the books of the company, any title to such stock, until the same was transferred on the books of the company; that all transfers made in excess of stock owned by the transferor, and all certificates for shares not held by the party named, were void; that the outstanding certificates did not prevent the transfer of the stock represented by it, and that the holder, without notice to the company, obtained no rights against the company, until such notice was given; that the company might waive the requirement of the by-law calling for the surrender of the certificate before transfer; and that the company are in no respect liable for the acts of Schuyler or his representatives, when done or made in transactions not authorized by the company. On the part of the defendants, the grounds of defense vary according to the particular interests of the several defendants, which it is unnecessary here to recapitulate.

The first inquiry is as to the effect of the over issue by the Schuylers in their transfers prior to October, 1853. It must be remembered that there was no over issue of capital stock at any time prior to that date, so far as related to the whole amount of stock outstanding on the books of the company. The excess was in the account of the Schuylers alone. If there had been such an over issue at that time, beyond the capital of the company, and that had not been remedied by calling in and cancelling sufficient stock to reduce the amount down to the actual capital, such false stock remaining on the books would undoubtedly affect the title of all persons to whom such shares should subsequently be transferred; but if the whole capital of the company was not at that time

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exceeded by such over issues, there would be nothing to prevent the company from receiving from the Schuylers payment for such over issued shares, or a satisfaction therefor, either by a re-transfer from them to the company, or in some other manner, by which the company could recognize such shares as valid, and treat the holders thereof as stockholders of the company. This appears to have been done in part, by a transfer of valid stock to R. & G. L. Schuyler from the company, of five hundred shares, on the 25th day of January, 1849, and of one hundred shares from R. Schuyler to R. & G. L. Schuyler, (which on the 25th day of January were transferred by the company to Robert Schuyler,) and by the purchase from Drew, Robinson & Co. and others, of seven hundred and forty-eight shares, on the 31st day of January, 1849. By these purchases the account was balanced, and no further excess of transfer took place prior to the time when the distribution and issue of the five thousand additional shares took place in August, 1851. The company at that time recognized all the stock outstanding, as legally issued, and as valid stock, and in whatever way such excess was remedied, whether by payment, by the purchase of other shares, and agreement with the company, or by some other arrangement, the acts of the company in recognizing such stock as entitled to a dividend and a share of the new stock to be distributed, and the acts of the company subsequently, down to October 18, 1853, in continually allowing transfers on the books, of this stock, are sufficient to warrant the presumption that by some arrangement between Schuyler and the company that over issue had been satisfied, the company had adopted the stock as good, and had recognized the holders as valid stockholders of the company. From this period in January, 1851, until October, 1853, no other over issue took place, and the stock ledger at all times balanced, and I am of the opinion that such over issued stock of 1853 is to be deemed good stock, made so by the assent of the company and by arrangement with Schuyler, and that the subsequent

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over issues of 1853, and 1854, cannot be aided or made good by any attempt to affect the previous transfers in consequence of over issues in 1848.

The next question is, what title, if any, passes to the holder of a certificate for good stock, who advances money upon it, having a power of attorney to transfer, but not making the actual transfer on the books of the company. It must be conceded that the certificate is nothing but evidence of title in the person named therein. It is not the thing claimed; it is not the stock nor the representative of stock. The delivery of the certificate to another would convey no title. The transfer of the certificate would amount to nothing, so far as the shares on the books of the company were to be affected, and as between the holders and a third person who had purchased the stock by transfer from the person to whom the certificate was issued. I can see no ground on which the court can hold that the holder of the certificate has any right which can overthrow the legal title to the shares obtained by transfer on the books. In the *Mechanics' Bank case* (4 Duer, 525,) Justice Slosson says: "The title to the stock, as between the seller and the buyer, is not affected by these provisions, (the rules as to transfer,) and the purchaser has a right to assume that the certificates represent actual stock, and that the company, whose business it is, has done its duty in seeing that the old certificate has been duly surrendered before the issuing of the new." The rules adopted by the company, as to the mode of making transfers, requiring a surrender of the certificate, although they may be insisted on by the company, yet are not sufficient to affect the rights or interests of third persons, who are ignorant of their provisions. (*Mechanics' Bank v. Smith*, 19 John. 115.) In the *Bank of Utica v. Smalley*, (2 Cowen, 770,) and *Gilbert v. Manchester Iron Co.*, (11 Wend. 627,) it was held that a transfer by a stockholder of his stock passes his interest, although not made in conformity to the by-laws of the company. And in *Bargate v. Shortridge*, (31 Eng.

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Law and Eq. 58,) it is said by Lord St. Leonards, in deciding that case, "I laid it down, after a great deal of consideration, that a company could be bound if they neglected to perform ceremonies, which they ought to perform, to the damage of other parties. In that case, transfers were held to be good, although the forms required were not complied with."

The pledge of the certificate, with the power attached, as security for money, would be similar to a mortgage on land without notice to a purchaser, and the grantee would take the title free from the mortgage lien. It is to give such notice that the registry act has substituted a recording for actual notice. Without that act, the mortgagee would not be protected except by actual notice. So in this case, the pledgee can claim no right to protection against a *bona fide* purchaser, without notice to him or to the company, to prevent such transfer, although he may hold an assignment, valid as between him and the pledgor, and which he might have enforced at any time while the pledgor held the stock on the books of the company. That the holder of the certificate and assignment with the power, takes an equitable title to have the stock transferred to him on the books of the company, is conceded, but this I consider to be all the title which he acquires. Until he exercises this right, he has no legal title to the stock. He can neither claim a right to vote, nor a right to dividends. He can exercise no power of transfer, except as attorney for the party executing the power; and if he neglects to give the company notice of his claims, or to have the stock transferred to himself, he has no right afterwards to avail himself of such neglect to deprive a third person of the stock, who has purchased it in the ordinary course of business, and to whom it has been transferred by the holder on the books of the company, even, although at the time of the transfer, the company may have waived the surrender of the certificate. The purchaser has no means of knowing whether such surrender has been made. He has a right to presume the company have discharged their duty.

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He is guilty of no fault or negligence, while the holder of the certificate is justly chargeable with the consequences of his own neglect in holding the certificate and power without either transfer to himself or notice to the company. And if, under such circumstances, a transfer is made to a *bona fide* purchaser without notice, such purchaser cannot be deprived of the stock so purchased, by any equitable title which the holder of the certificate may have against the former owner, or against the company, to compel a transfer.

These principles were referred to in the Mechanics' Bank case in 3 Kernan, although it may be said that as the certificates represented spurious stock, they were not absolutely necessary to the decision of that case. In *Ex parte Willcocks*, (7 Cowen, 411,) the court says, in regard to hypothecated stock: "We do not hesitate to say, that in a clear case of hypothecation, the pledgor may vote. The possession may well continue with him, consistently with the nature of the contract, and the stock remain in his name. Till enforced, and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation have nothing to do." In the *Union Bank v. Laird*, (2 Wheat. 390,) it was held, that no person could acquire a legal title to shares, except under a regular transfer according to the rules of the bank, and that if any person took an equitable assignment, it must be subject to the rights of the bank. So it has been repeatedly held in Connecticut, that a sale or pledge of stock, with a power of attorney to transfer, is of no avail until the transfer is made on the books of the company. (2 Conn. Rep. 579. 3 id. 546. 6 id. 552. 5 id. 246.) In *Wilson v. Little*, (2 Comst. 447,) Ruggles, J. says: "The case does not show what the by-laws of the company were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock and to secure them against a transfer to some other

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person." Even admitting that both parties have an equal equitable title, the transferee on the books has, in addition, the legal title, and in such cases the rule that the legal title and equal equity shall prevail over the equity, would prefer such party to whom such transfer had been made in the books. I am, therefore, of the opinion that the transfer of stock upon the books of the company to a *bona fide* holder for value, carries the title to the stock, although the certificate previously issued was not surrendered at the time of the transfer.

Another question which arises in this case is, whether a transfer of stock made by a party who, at the time, had no stock in his name on the books of the company, can be made good by subsequently acquired stock. That such a transfer may be so made good by a person who has made transfers beyond the amount held by him, by an agreement with the company that other stock shall be so applied to his credit, I think cannot be doubted. If such over issue has taken place, there is no equity in refusing to the party making it the right to make it good. This may be by the party who has done the wrong, paying for the stock and making it valid, if the company had any shares undisposed of, or by placing an equal number of shares to his credit, and agreeing to such an application, and in this way the wrong would be remedied, and the party injured, as well as the company, be protected from loss. It was suggested that in such a case the party receiving the transfer was not a party to the agreement, and therefore it would not be binding on him, so as to deprive him of a claim for damages, but he would, in such a case, sustain no damage. He could, in no instance, recover beyond the value of the stock. But, beyond this, I know of no rule by which subsequently acquired stock can be made available to make good previous transfers, which, at the time they were made, conveyed title to no stock whatever. The party making it, transferred nothing, for he owned nothing. The party receiving the transfer, acquired no title to stock, because the transferor had nothing to transfer, and therefore could give title to no

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stock. The warranty of title, which is implied in the sale of personal property, would not draw after it the subsequently acquired property, as it does in real estate, because, in such a case, the transferror is not the party who suffers alone, but the company also, and because the subsequently acquired stock would not be the same stock which the vendor previously agreed to sell. That rule, in regard to real estate only, applies to the specific piece of property sold with a warranty of title. But after acquired stock can, in no case, be identified as the same stock transferred by the previous transfer, and the rule, as to real estate, could not be made to apply to the case of stock of an incorporated company. There is, therefore, no rule or principle by which after acquired stock can be applied to making good a previous transfer, unless it is done by a special agreement that such application shall be made, or by payment therefor, if the company has surplus stock to be so applied.

There are some instances of such transfers, apparently, where the evidence would not allow the application of the rule—not because it is not applicable, but because the evidence will not warrant the conclusion that the transferror had received the stock. I refer to those cases in which, if the numbers of the transfer are relied on exclusively, the transfer is made at an earlier number than that in which the transferror received the stock. Where both papers bear the same date, we can presume that they were made as they ought to have been, instead of presuming that any fraud was actually committed; and, in such cases, it is very easy to suppose the transfers were filled up, and left to be executed at the same time, although the numbers of the transfers make them appear to be misplaced. Without special proof that such transfers were made before the stock was received by the transferror, the evidence is not sufficient to warrant the presumption that the transfer was improperly made. As no such evidence has been furnished in regard to any transfers so executed, the stock must be presumed to have been received before the

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transfer was executed, although of a number prior to that by which the transferror obtained the same, whenever both transfers bear the same date.

Another question arises as to what passes under a certificate and power of attorney, where the transfer on the books is not made until long after the date of the power. By the power of attorney annexed to the certificate, the party executing first assigns a specified number of shares of stock, and then authorizes the attorney to transfer the said shares. The date of the power, and not the time of making the transfer, must decide what stock is transferred. The power of attorney authorizes the transfer of the said stock, viz. the stock previously transferred therein, and it cannot, in any way, be made applicable to stock acquired after its date and execution. If the transferror had stock in his name at the time of the execution of the power, and stock still continues in his name until the transfer is made on the books of the company, the stock would pass under the transfer. But if the transferror, subsequent to the execution of the power, had disposed of all the stock standing in his name, the attorney could transfer no subsequently acquired stock, and such transfer would, therefore, be a nullity.

The same rule must be applied to outstanding certificates with powers, which have not been transferred. If any such are held by any of the defendants, and the party giving the power had stock standing to his credit on the books of the company, at the date of the power, the person holding the certificate and power should be allowed to change his equitable title to a legal one by transfer; but if no such stock remains in the party giving the certificate of the date of the power, then there is no stock to meet such certificate and power, and the same should be declared void.

Having thus disposed of the case on the part of the plaintiffs, it becomes necessary to decide as to the claims set up by the defendants for damages, either by way of counterclaim, or upon the ground that the plaintiffs, before they can

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call upon the court for equitable relief, must do equity. Neither claim can be sustained, unless it is established that the plaintiffs are liable to the defendants in some form for damages on account of the issue of spurious stock; for allowing transfers on their books of such stock, and giving certificates therefor, when no such stock existed; or for allowing valid stock to be transferred without requiring a surrender of the certificates previously issued therefor. It becomes, therefore, necessary to inquire what liability, if any, can be enforced against the company. This question, to some extent, has been discussed by the learned justices of the court of appeals, in the cases referring to this company.

In the case of the *Mechanics' Bank v. The New York and New Haven Rail Road Company*, (3 Kernan, 599,) Mr. Justice Comstock, in delivering the opinion of the court, held "the certificates to be utterly void, not only on the ground of no equity on the part of the plaintiffs, which could be enforced against the defendants, but also upon the ground that they were issued by Schuyler without authority, and beyond the powers vested in him by the company, and that such certificates were void under all possible circumstances, so that no person, in whatever situation, could claim under them the rights of stockholders, or damages on the ground of a refusal to admit them to such rights." The same views were repeated by him in a dissenting opinion in the *Farmers and Mechanics' Bank of Kent v. The Butchers and Drovers' Bank*, (16 N. Y. Rep. 142.) And in this case, when before the court of appeals, in 17 *id.* 592, it is also said, that "it is impossible to say that any one of them is a valid representative of stock, or claim of any kind against the corporation." If these questions had been necessarily involved in the cases referred to, the opinions there delivered would be conclusive upon this court, and it would be unnecessary to make any further examination in regard thereto. But as these questions were not necessarily involved in either case, it cannot be considered that the opinions, on those points, were necessarily

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the decisions of the judges of the court of appeals, but only the views as entertained by the learned judges who delivered those opinions.

To a certain extent, the case of the *Mechanics' Bank v. New York and New Haven Rail Road Company*, in 3 *Kernan*, is a decision of the claims of some of the defendants here. I understand the court in that case as holding that a person dealing with the fraudulent agent, who has knowledge of the fraud, or who received the certificate of stock without paying any value therefor, could acquire no rights against the company, and that persons taking such certificate from him received the same, subject to all the equities that existed between the assignor and the company. There is no case in which stock was thus obtained, except those in which Kyle received the certificates, and passed them to others; and that decision can hardly be said to control the claims of any other defendants than those who dealt with Kyle. The other expressions used in the opinions in those cases can only be regarded as the separate views of the learned justices by whom they were delivered, entitled here to the highest consideration. It must be remembered, however, that in those cases the facts upon which the defendants' claims are based, were not in evidence, and could not have been then considered by the learned judges in forming their decisions.

From the evidence now before me, these claims arise in the following cases :

First. For the fraudulent act of Schuyler in issuing certificates of stock, as held by R. & G. L. Schuyler, for which there was no stock to their credit, and which was not based on any transfer of stock to them, and obtaining from the holder an advance of money thereon.

Second. For allowing transfers of stock on the books, by persons having no stock to their credit at the time of transfer.

Third. For giving certificates of stock to the credit of persons to whom such transfers were made, when in fact no stock had passed by such transfers,

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Fourth. For allowing the holders of good stock to transfer the same, without requiring a surrender of the certificate previously issued, on which the claimant has made advances.

Many of the persons holding claims for the spurious stock, or on account of it, have not set up any counter-claims in their answers; and in such cases it is only material to decide on the right to present such claims, as it might limit the extent of relief to be given to the plaintiffs in the final judgment in this case. The principal grounds upon which it appears to me such claims may be sustained, are for the acts of the transfer agent in issuing false certificates, and allowing false transfers, and for negligence on the part of the company, and its officers, in permitting transfers of spurious stock to be made on the books of the company, to persons desirous of becoming stockholders therein. The charter requires such books to be kept, and designates the purposes for which they are to be used. Permitting them to be used for the purpose of committing frauds on others who were desirous of purchasing stock; issuing to such persons certificates of stock, and informing buyers who applied for information in regard to stock, before they paid for it, that stock had been transferred on the books, were, in my judgment, acts for which the company should be held responsible. (*See Bank of Ireland v. Evans's trustees*, 32 *Eng. L. and Eq. Rep.* 32.) They retained from public examination the books of the company; no other means could have been adopted than those that were used, to ascertain what stock had been transferred, and whether their money could be paid in safety, while attending to such transfers, and giving certificates of stock was a matter which was specially confided to the charge of the transfer agent and his clerks. In the case in the court of appeals, before referred to, the want of authority on the part of the agent to issue certificates for spurious stock, is the reason given for not enforcing any liability. In the *Mechanics' Bank v. The Company*, it was conceded by the learned justice, that if Schuyler had been the agent of the company to sell stock and issue certificates

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therefor, a sale and certificate by him would have been valid against his principals, although he applied the proceeds to his own use; and, he adds, "Such were not the relations between Schuyler and the corporation, nor was he held out to the world as standing in such relations. He had no power to sell stock at all, and none to issue certificates, except as incidental to a sale between existing stockholders; and then it depended on the condition precedent of a transfer on the books," &c. The evidence on the present trial shows the reverse of these propositions. All the stock, with the exception of about one thousand shares, was, from the organization of the company, disposed of by the transfer agent, as the officer of the company, by transfer, either to the new subscribers, obtained on the second subscription, or to other persons to whom it was sold and transferred by him; and, down to a very late period of his agency, such transfers are found on the books. How far these facts might have altered the conclusions arrived at in that case, it is not for me to say.

There are some counter-claims set up by the defendants in this action, which would not warrant a recovery in any action. In this class the averment is, that the defendants purchased the stock, (now found to be spurious,) or, by certificate, became entitled to it, and applied to the officers of the company to be allowed to transfer such stock on the books of the company, and were refused. I am at a loss to see how this can be a cause of damage against the company. If the stock was spurious, the plaintiffs were bound, in discharge of their duty, to refuse such application. The transfer of spurious stock on the books of the company would afford the claimant no better security, and could result in nothing to his advantage, excepting in exposing the company to a claim for damages, in permitting such a transfer upon the books. In such cases, the holder of the certificate or stock can claim nothing for the refusing to allow a transfer of spurious stock on the books of the company. If they can recover at all, it must be upon the rights as they existed at

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the time of receiving the certificate or transfer, and for other causes than the mere refusal of the company to permit a transfer of spurious stock upon their books. The claimant could sustain no legal damage because the company would not allow a transfer of spurious shares on their books, or would not give the certificate for spurious shares, even after such a transfer had been made. I can see no ground on which such a claim can be allowed.

A second ground of counter-claim is for the fraud of Schuyler in issuing false certificates, and making false transfers on the books of the company to the defendants, while he held no stock to meet such transfers and certificates. In the opinion of Mr. Justice Comstock, in the *Mechanics' Bank* case, 3 Kernan, he says: "It must be conceded, as a further result, (if the certificate is void,) that the certificate is void under all possible circumstances, so that no person, in whatever situation, can claim under it the rights of a stockholder, or damages, on the ground of a refusal to admit him to such rights." And again he says: "I do not see how certificates of stock, which they themselves had no authority to issue, void in their origin, and, under all conceivable circumstances, can be made the basis of a liability ruinous to the genuine stockholders, by turning the spurious instruments into a promise or undertaking that the stock in fact existed." I suppose both in the case above cited and in the present case, in 16 N. Y. Rep., the opinion is fully expressed, that for such fraud of the agent the company is not liable.

The case of *Hubbersty et al. v. Ward* (18 L. and E. Rep. 351) is relied on, which holds that a captain, after signing bills of lading for goods received on board of his vessel, has exhausted his authority, and that he has no power, by signing other bills of lading for goods not on board, to charge his owner. So also *Grant v. Norway*, (2 Eng. Rep. 337.) The like ruling in *Coleman v. Riches*, (59 L. and E. 323,) holds that where an agent, whose duty it was to receive goods, and give receipts therefor, fraudulently gave a receipt for goods

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which had not been received, the principal was held not to be responsible, because it was not within the scope of the agent's authority, in the course of his employment, to give such receipt. Although these, and other authorities cited, would seem to deny the liability of the principal for the fraudulent act of the agent, when in doing such act he exceeded the authority conferred upon him, I should not be inclined to hold them conclusive upon this question. In the case last cited, Williams, J. says: "If it had appeared that by the course of business the defendant was bound, for the benefit of the plaintiff, to furnish the plaintiff with a receipt, I should have had a difficulty in saying that the defendant was not liable." These cases, however, in regard to bills of lading, differ from the present one in the fact that, in all these cases, the party to whom the bill of lading was issued in the first instance must necessarily have been a party to the fraud of the captain, and stood in the same relation to him that Kyle did to Schuyler, in the case in 3 Kernan. In all other cases of dealings with Schuyler, there is no evidence of such knowledge on the part of those who dealt with him.

In the *Bank of the United States v. Davis*, (2 Hill, 451,) Ch. J. Nelson says: "It is no answer to say that a director of a bank is not to be regarded as acting in the capacity of a director in behalf of the bank, but for himself, while engaged in perpetrating the fraud. Nor is there any thing novel or singular in the idea that an agent may be guilty of fraud and deception in transacting the business of his principal, or in the law that holds the latter responsible for the consequences to third persons." In that case it was held, that the act of a director in getting paper discounted, and using the funds for himself, while he knew that the paper belonged to another, was a fraud upon such party, and that the bank was liable for such fraudulent act, upon the ground that the director knew of the fraud and knowledge in the director, was notice to the bank of such intended fraud. Ch. J. Nelson says: "The plaintiffs appointed the director, and held him out to

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their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud." And in the late case of *The Farm. and Mech. Bank of Kent v. The Butchers and Drovers' Bank*, (16 N. Y. Rep. 125,) the rule as to the liability of the principal for the act of the agent is qualified, so as that, while the agent must be acting in the business of the bank and within the scope of his employment, *so far as that can be known or seen by the party dealing with him, the bank would be responsible*. The reasoning of Mr. Justice Selden in that case, upon this point of the liability of the principal, appears to be fully applicable here. He says, "the bank selects its teller (transfer agent) and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, *so far as is known or can be seen by the party dealing with him*, he is guilty of misrepresentation, ought not the bank to be responsible? The fact misrepresented is not only one within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed—which it is his special province and duty to know, and which would scarcely be ascertained, except by application to him." It seems to me that under no form of words could a more forcible argument be adduced to show the liability of the company for the acts of Schuyler while professing to act as transfer agent in a matter apparently within the scope of his authority, and when the fact misrepresented was peculiarly within his own knowledge.

There is also another class of cases in which a counterclaim is set up, and in which there are probably stronger grounds for recovery. I refer to that class in which the negligence of the officers or clerks of the company is charged upon them as the cause of loss and damage. The claim rests

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upon the duty imposed by law upon the company to keep transfer books for the purpose of transferring stock in the company, and upon the fact that when applied to by persons about to purchase stock in the company, to know whether shares had been transferred to them, the officers and clerks of the company gave the information that shares had been transferred, and also gave the certificate thereof; on which statements money was paid, when, in fact, no shares had been transferred, and the party making such transfer had none to his credit to dispose of. For this negligence of the officers and clerks of the company in discharging the particular duty assigned them, I see no reason why the principal should not be held responsible. They were directed to keep these books by law; they refused to purchasers of stock the privilege of examining for themselves such books, and when the purchasers resorted to the only means of protection which remained, viz. by inquiring of the clerks whether the stock had been transferred, they were misled, through the willfulness or negligence of the officers of the company, and sustained loss thereby. It seems to me so contrary to every principle of justice and honesty to say that for such acts, either of fraud or negligence, the company should not be responsible, that I cannot assent to that proposition in regard to either of those conclusions, but, on the contrary, I am of the opinion that, under these circumstances, the company is liable to respond in damages for any loss sustained thereby, either for the fraud or the negligence of its officers or agents. In the present case, however, I am of the opinion that counter-claims cannot be allowed. The action is not brought upon any contract. It is an equitable action, to have what is deemed an injury to the owner of the property invested in the stock of the company, removed. In such an action there cannot be a counter-claim, except such claim as arises out of the transaction set forth in the complaint as the foundation of the plaintiffs' action. The claims of the defendants do not arise out of that transaction, but are subsequent to it. They

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are properly the subject of a distinct action. The other case in which a counter-claim is allowed by the code, is where the action is founded upon a contract, and the defendant has a claim upon contract, he may set off one against the other. As neither this action nor the counter-claim in this case rests upon contract, that clause does not apply to this case. (*Burns v. Nevins*, 27 Barb. 493.) Although I am of the opinion that most of the claims of the defendants might be sustained in actions against the company, I am forced to the conclusion that, in this case, such counter-claims cannot be allowed, because they are not warranted by the code of procedure.

It was urged in behalf of some of the defendants, who have not set up a counter-claim in their answers, that they could obtain relief upon the principle that, before the court grants to the plaintiffs the equitable relief to which they may be entitled, they should be required to do equity. That rule, however, is not one which can be applied to these cases. A plaintiff is never required to do equity in order to obtain equitable relief in any other matter than that in which he seeks to obtain it, and then he is to do equity by restoring to the party whatsoever he may have received from him in the transaction sought to be set aside. It does not apply to a case where for the injury damages may be recovered, and it would be almost impossible as to most of the defendants in this case to ascertain, from the evidence furnished, what damages they are entitled to, if damages were awarded. I do not intend to say that the court might not retain the cause, and order the damages to be assessed by a referee or a jury. (5 *John. Ch.* 194.) The latter would probably be the better course, and then each assessment would be equivalent to a trial. I can see no benefit to be derived by the defendants from such a course. On the contrary, by leaving the defendants to their separate actions for damages, a speedy opportunity is allowed to have the question of liability, as decided in this case, to be reviewed in the court above, and

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the right to such damages will thus be settled without the great delay that will necessarily take place if such assessment was made at the present time. I, therefore, deem it unnecessary to discuss further than I have done, the particular cases under which these damages are claimed. It is sufficient for the purposes of this action to say, that these claims are not of that class which have been passed upon by the court of appeals, that they may be presented by the parties in such a manner as to entitle the defendants to recover against the company; and that, on that account, no injunction should be awarded restraining the defendants from bringing such actions, if so advised. There are also cases in which certificates, good at the time they were issued, have been rendered invalid and worthless by the negligence of the company or their agents in permitting a transfer to be made in violation of the transfer regulations. Without any further discussion of those claims, I shall content myself with saying that no injunction restraining actions for damages by such parties should be granted, and that in such cases a good cause of action might exist against the company for which damages may be recovered. (*Pollock v. National Bank*, 3 Seld. 274. *Commercial Bank v. Kortright*, 22 Wend. 348.)

My conclusions on this branch of the case are, that no claim for damages can be recovered by the defendants against the plaintiffs in this action. And secondly, that no injunction should be granted restraining any of the defendants from bringing or prosecuting such actions, if so advised.

A motion was made when the plaintiffs rested, and was renewed at the close of the case, to dismiss the complaint, because it appeared that some persons who had spurious shares were not made defendants. That it would have been desirable to have all the persons who had spurious shares united in one action, so long as such an action could be in any event maintained, is not to be denied. But there is no absolute necessity for such a result. So far as there are defendants holding spurious stock, the decision as to them will be bind-

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ing. If afterwards other parties are found holding spurious shares, their rights can be ascertained in another action, without in any way interfering with the determination as to the present defendants. The action might have been maintained as to one defendant, or as to more than one, and as between the plaintiffs and the present defendants, their rights can all be determined in this action. In the case of William Dennistoun, it was urged on behalf of his counsel, that as the transfer to him was the first transfer of Schuyler, by which an over issue was made, the company should be required to apply the seventy-eight shares held by them undisposed of, to make good the shares in that transfer which are otherwise spurious. I suppose it is conceded by all the cases, that if the company had shares undisposed of, with which they could make good the over issues, they would be compelled to do so, and would be estopped from denying the validity of such transfers. The doctrine of estoppel, I have heretofore said, does not apply to make good an act forbidden by statute, but that rule would not apply to the seventy-eight shares undisposed of. The defendant Dennistoun is not, however, entitled to those shares. The persons holding certificates issued prior thereto with power of attorney and transfer, having an equitable title to any stock which could be applied to such a purpose, would have a prior equity to that of Dennistoun. Such stock should be properly applied to the oldest certificates. And where there are some originally valid, and which have been made void by transfer, I think the company should apply those shares to satisfy such certificates. As the parties holding the oldest certificates are not parties to this action, no judgment can be made therein to direct such application. I refer to it here in answer to the claim made to such shares on behalf of the defendant Dennistoun.

Most of the facts on which the plaintiffs have based their action are not disputed by the defendants, and so far as there has been evidence furnished on the trial, that evidence has not contradicted any of the material facts proven on the part

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of the plaintiffs, so as to raise any doubt as to the facts of this case. The decision of this case rests mainly on the legal questions which have been submitted by the respective counsel. I consider the following facts as established :

1. That the company was duly incorporated by the legislature of Connecticut, in 1844. That in 1846, the legislature of New York authorized the company to extend their road to and unite with the Harlem Rail Road Company at Williamsbridge, and such act was assented to by the legislature of Connecticut the same year.

2. That in pursuance of the charter the board of directors attempted to obtain subscriptions for the capital stock of the company, which attempt failed.

3. That afterward, about October, 1846, a formal subscription was made by certain persons to the capital stock of the company, amounting to 24,400 shares, exclusive of the subsequent increase, on which a payment of one dollar per share was made. That a board of directors was elected on the 19th of May, 1846, and the company was then duly organized. That on the same day the directors organized their body by electing Robert Schuyler president. That on the 10th of November, 1846, the board resolved to make up the capital stock to 25,000 shares, and passed a resolution providing for a further subscription and distribution thereof, together with 9680 shares placed by the former subscribers with the president of the company for distribution, and directing the same to be offered for sale and distribution on terms prescribed by them in the resolution.

4. That various subscriptions were afterwards obtained, by which the whole of such stock was subscribed for.

5. That such subscriptions were recognized by the company, although not obtained in the mode specified in the act of incorporation, by the resolutions passed December 31, 1846.

6. That subsequently, in August, 1851, the board of directors agreed to increase the capital stock to 30,000 shares, and directed the same to be apportioned among the then ex-

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isting stockholders, as standing on the stock ledger for the dividend payable on the 15th of August, 1851.

7. That on the 15th August, 1851, a dividend was declared and paid to the stockholders on the books of the company, according to the stock ledger, which comprised all the stockholders then owning stock on the books of the company, as per Exhibit No. 29, at which time R. & G. L. Schuyler were recognized as holders of 854 shares.

8. That such distribution was accordingly made, and the 5000 shares were so distributed and taken by such stockholders, except 68 shares, which were fractions of shares, not taken by those who were entitled thereto, and which remained undisposed of.

9. That Robert Schuyler was appointed transfer agent at New York, J. G. Sheffield at New Haven, and J. E. Thayer & Brothers at Boston, by resolutions of the board of directors on 3d February, 1847.

10. That the stock so subscribed for and distributed, appears to have been, in most, if not all cases, transferred by one of the transfer agents, on behalf the company, to the subscribers.

11. That there were, at all times, transfers made to the transfer agents on the books of the company, for the account of the company, and the stock so transferred was afterwards disposed of by such agents.

12. That ten shares of stock taken by George Peck were declared forfeited on 4th May, 1853, and a resolution then passed, authorizing the president to sell the same, and also the 68 shares of the stock not taken in fractional shares, by the subscribers, so as to make the whole capital stock 30,000 shares.

13. That George W. Whistler was appointed vice president on 10th August, 1853, and resigned 31st May, 1854.

14. That William E. Worthen was appointed vice president on 14th June, 1854.

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15. That on the 5th July, 1854, the transfer books of the company were closed.

16. That Robert Schuyler, the president, was a member of the firm of R. & G. L. Schuyler.

17. That said firm held large amounts in the stock of the company.

18. That prior to the distribution of the 5000 shares in August, 1851, the firm of R. & G. L. Schuyler, by transfer, had caused an over issue of stock in their stock account, to a large amount, and exceeding 1000 shares above the number of shares that had been transferred to them previous to such over issue.

19. That it does not appear in what manner such over issues were remedied, but that on the 17th of October, 1853, Schuylers' stock account balanced with four shares to their credit.

20. That at all times previous thereto, the stock ledger account always balanced with the stock issued by the company, so that at no time previous thereto was there an issue by the company or its agent of more stock in the aggregate than 30,000 shares.

21. That at that date R. & G. L. Schuyler had outstanding certificates signed by R. Schuyler, transfer agent, for 7042 spurious shares of stock for which no transfer had been made to them on the books of the company.

22. That in October, 1853, R. & G. L. Schuyler commenced an over issue of shares by transfer, and that between that time and the 4th of July, 1854, there were transfers of spurious shares made by them up to that date on the transfer books of the company amounting to 17,497 shares, and certificates also outstanding in their name for shares for which no transfers existed on the books, to 1648 shares, making the whole amount of over issued stock by transfer and by certificate 19,145 shares.

23. That these shares and certificates are claimed by the

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defendants in part, and by others, as will appear by a statement hereto annexed.

24. That the over issue of stock was originally made in some cases by transfers, when there was no stock standing to the credit of the Schuylers, and in other cases by the issue of certificates for stock, when no such stock was owned by them, accompanied with an assignment and power of attorney, authorizing a transfer, and then in most cases such stock was subsequently transferred on the books of the company by the attorney, excepting in the cases of 1648 shares pledged by the parties to whom the certificates were issued as security and not transferred on the books of the company.

25. That in some cases the certificate when issued was a certificate for valid stock held by R. & G. L. Schuyler at the date of its issue; and after the same was issued, that R. & G. L. Schuyler transferred on the books of the company such shares without surrendering the certificates.

26. That the transfers were all made in books kept by the company, which were regularly numbered prior to the book being used for the purpose of transferring, and in some cases transfers were made by the Schuylers, as well as by others, of shares which were transferred to them either on the same or a subsequent day—such transfers in some cases being for the same number of shares, and in others for amounts of different quantities, and the transfers made by them were sometimes numbered of a later number than that by which they received the stock.

27. That the company provided rules for transferring stock, as set out in the complaint, by which rules it was provided that all transfers should be made in the books of the company, and that all certificates of stock, which should have been issued, must be surrendered prior to a transfer of such stock being allowed on the books of the company. These rules also provided for transfers by attorney under a power of attorney under seal.

28. That the company adopted a form of certificate and

power of attorney. That in the power of attorney so adopted and used, there was a clause of transfer and assignment by the person in whose name the stock purported to be standing when the certificate was issued.

29. That in many cases the company, or their agent, permitted transfers of stock to be made in the books to persons other than those to whom such certificate and power with an assignment had been pledged as security, and that such transfers had been made in violation of the by-laws adopted by the company as to transfers.

30. That the persons holding such certificates did not give notice to the company of their claim to a lien upon such stock, until after such stock had been transferred on the books of the company.

31. That such persons have sustained damage thereby.

32. That in most of the cases in which the defendants have appeared and answered, proof has been furnished to show that such defendants, on receiving the transfers and certificates, either paid value for the stock if purchased, or made loans thereon, in good faith, and without knowledge of the frauds or over issues of Schuyler, and without any grounds sufficient to cause suspicion thereof.

33. That in the case of Kyle, it does not appear that he paid any value to Schuyler for the stock issued to him, but it is shown that the Mechanics' Bank loaned money to Kyle upon the said certificates, and had a transfer to them of part of the stock.

34. That in many of the cases the defendants, before paying for their stock, or advancing money thereon, made or caused to be made application to the officers or clerks in the employ of the company to know if stock had been transferred to them, and were informed that such transfers had been made, and that they then paid or advanced money, relying on such information from the agents of the company.

35. That in all such cases the defendants have sustained

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damage from the acts of the officers, clerks, or agents of the plaintiffs.

36. That Robert Schuyler failed on or about the 3d day of July, 1856, and then communicated to the board of directors that difficulties existed as to the stock, and referred them to the stock ledger as containing much that was wrong.

37. That, up to that time, there is no evidence of any actual knowledge by any of the directors of any fraudulent acts on the part of Schuyler, in the performance of his duties as transfer agent.

38. That such frauds were committed both as transfer agent of the company, in giving false certificates, and permitting false transfers on the books of the company, as well as a stockholder of the company as one of the firm of R. & G. L. Schuyler, in making transfers and obtaining certificates from the company for more shares than they held on the books of the company.

39. That a proper examination of the books by the directors would have enabled them to discover the frauds which were perpetrated by Schuyler, and that the board of directors were guilty of negligence in not making such examinations, and in leaving the entire charge and control of the transfer of shares, and giving certificates, with Schuyler, without making such examination.

40. In making out the statement of facts, the general finding only is stated, and, in these respects, many others may be thought necessary to be added, by the respective parties. The particulars of each case in which the defendants have answered will also be stated, for which the findings must be drawn and settled hereafter, in connection with those above stated, if the same shall be deemed necessary.

The law, as applicable to these facts, I find as follows, viz :

1. The stock of the company being limited to 30,000 shares, by the charter of the company, it was not in the power of the board of directors, by any resolution or act of such board, to increase the number of shares beyond that amount.

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2. If the directors could not, by their own act, increase the number of shares beyond 30,000, they could not delegate to their agent, either directly or indirectly, authority to make such increase.

3. If neither the board, nor its agents acting under its authority, could do an act by which the capital stock could be increased, no act of negligence or misconduct on the part of such agent could effect, by any liability for such acts, what the company could not do directly.

4. Consequently, the doctrine of estoppel cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in answer to a claim to such stock, that the same is void, as being issued in excess of the capital.

5. By this I mean, that no one can be estopped from refusing to do an illegal act; but that an estoppel can only operate in favor of a party injured, where there is no provision of law forbidding the party against whom the estoppel is to operate, from doing the act which is sought to be carried out through its operation.

6. The doctrine of estoppel is only available to the party for whom it was designed, and does not operate in favor of a stranger to whom the representation was not made, and is not applicable to this case excepting as hereafter stated.

7. That no legal title passed to any one who received from the owner a certificate of shares of stock, issued by the company, with a transfer indorsed thereon, and a power of attorney to transfer the same, even though the person to whom such stock was delivered advanced money on the receipt thereof, but that the party receiving the same only acquired an equitable title, valid against the party named in the certificate to compel a transfer of such shares on the books of the company, while the same remained in his name thereon.

8. By the law, and by the statute of Connecticut, passed 1849, such an assignment is not valid against any but those making it and their representatives, and such law operates

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upon all transfers of the stock of the company, whether made in Connecticut or New York.

9. A transfer on the books of the company for value, to a *bona fide* holder, would pass to him the shares so transferred, although at the time the transferror had a certificate in his name outstanding for the same, which he did not surrender at the time of transfer.

10. The fact that the owner had pledged the certificate to a third party, as security for money borrowed, without notice to the company thereof, would not affect such transfer, or the title of the transferee, to the stock so transferred.

11. A transfer by a person, who at the time held no shares on the books of the company, passed no title to any shares of stock in the company.

12. Such a transfer conveys no title to stock subsequently acquired, and could not be made good by a transfer to the person making the same of subsequently acquired stock.

13. Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfer may be such as to make the transfer by the transferror appear earlier than the transfer to him; unless it was proven that such transfer was made prior to the one by which the stock was assigned to the transferror.

14. The by-laws of the company, requiring a surrender of the certificate before making a transfer, are not binding on third persons so as to affect their rights, or deprive them of their property.

15. Where stock is transferred under a power of attorney attached to a certificate, which power also contained an assignment of the shares, and authority to transfer the said shares, the power did not authorize the transfer of any shares acquired after the date of the power.

16. Such transfer could only operate to transfer stock held by the person named in the certificate and power, at the date of the power; and if such stock was previously transferred

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by him, no title would pass under the transfer of the attorney to any stock subsequently acquired by such person.

17. In the case of a certificate and power of attorney, held by the party to whom it was pledged, without making a transfer on the books of the company, the same rule should be applied. Such certificate and power would entitle the holder to an equitable title to any valid stock held by the person named therein of the date of the power, if he continues to hold such stock to the present time, but if all the stock held by the party at the date thereof has been sold by him, then the certificate has ceased to be of any value, and should be canceled.

18. That the company having permitted R. & G. L. Schuyler to sell stock covered by certificates when there was stock standing to their credit sufficient to cover such certificates, is bound to make good such certificates to the extent of any shares owned by the company, within the capital stock of the company, and that the seventy-eight shares of the company unsold should be applied to the satisfaction of the oldest outstanding certificate of that character.

19. That the defendants who have received transfers of spurious stock by the acts of the transfer agent, or certificates of spurious stock from the transfer agent of the company, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action.

20. That defendants, who have been misled by the acts or negligence of the officers of the company, and have advanced money in consequence thereof, are entitled to recover damages against the company, in a proper action.

21. That persons holding certificates of stock, valid when they were issued, accompanied by an assignment and power, on which they have advanced money, may recover damages against the company when such certificates have been rendered of no value by the allowance of transfers on the books of the company, without requiring the surrender of the certificates.

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22. That such damages cannot be recovered in this action by way of counter-claim.

That the following rules must be adopted, as to the separation of the stock :

1. The certificates are to be rejected where a transfer of the stock or shares mentioned therein has been made on the books, and the certificates, with power attached, have ceased to be of value, where all the stock held by the party at the date thereof has been transferred.

2. That the transfers on the books of the company are to be held valid, even without the surrender of the certificate at the time of the transfer.

3. That transfers only convey the legal title to stock held by the party at the time of making the transfer.

4. That transfers made on the same day on which the stock is received, are valid and convey the title, although the transfer to the party is entered in the transfer book, on a transfer of a prior number than that by which he received the stock, provided the date of both transfers is the same.

5. That transfers by power of attorney can only convey stock held by the party executing the power of attorney at the time of its execution, and in the absence of any other proof, the date of the power must be taken as such time. If there is no date to the power and no proof of its execution, the date of the transfer by the attorney must govern.

6. If all the stock, held at the date of the power, has been transferred by the party giving the power, before the attorney makes the transfer, no stock would pass under such transfer, and the same is to be disregarded.

7. The same rule must be applied to outstanding certificates and powers, where no transfer has been made by the attorney, and where an equitable title exists in the holder of the same ; and if all stock held by the party giving the power at the date thereof has been transferred, such power and certificate ceases to be of any value, and no stock can be transferred thereby.

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In making the distribution of the stock, according to these rules, I have found it necessary to provide a different stock ledger from that furnished by any of the parties on the trial. Such a compilation will be filed with the clerk of the special term, at the time of making this decision, and is marked "Stock Ledger adopted by the court," with the title of the cause, and signed by the judge. After a reasonable time it will be delivered to the plaintiffs, to be kept by them for future reference. The cases in which this ledger differs from that produced on the trial, and designated as No. 82, will be seen on examination, as all the alterations from that exhibit are made in red ink, and can easily be distinguished. The result of this division of the stock makes the persons designated in the list herein contained, to be the holders of the spurious stock. Where a certificate has been issued, the number of the certificate is given; and, in all cases, the number of spurious shares, either in whole or in part, is stated. As to some persons named therein, as holding spurious stock, no decree can be made, because they are not parties to this action. As to others who are parties, it will be necessary for the plaintiffs, if they see fit to ask a judgment as to all the shares so held, to amend the complaint in regard to the number of spurious shares held by those parties. As to those defendants who have not appeared or answered, the plaintiffs are entitled to judgment by default; but no decree, as to the stock held by them, will be made in the cases in which their stock is found to be good.

Under these rules, the following stock, held by the defendants named, is adjudged to be spurious and void; the certificates are ordered to be canceled, and the holders thereof are to be restrained by injunction from claiming the same as valid stock, or bringing any action to enforce such claim; but such injunction is not to be considered as preventing the defendants from making any claim for damages, or bringing any action therefor, for any of the causes before stated, as furnishing grounds for recovering damages against the

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company. Such judgment will apply to all the persons named in the following list, except Ezra Baldwin, William B. Cooley, Gracie & Dashwood, W. S. Holabird, R. H. King, R. L. Maitland & Co., J. W. Perrot, Edwin Sherwood, W. Tuller and H. S. Tyler, who were not made defendants, and against whom no judgment can be rendered. [Here follows a list of the names of persons claiming stock, by transfers, or otherwise, which is declared to be spurious.]

The following certificates of stock held by defendants, which were issued by R. Schuyler, transfer agent, in the name of R. & G. L. Schuyler, subsequent to October 18, 1853, and which were so issued fraudulently, there being no stock held by them at the time of giving such certificates, are declared to be void, and are ordered to be canceled, and the holders thereof are to be restrained by injunction in like manner as before directed, viz: [This list is omitted.]

And the following certificates of stock, issued prior to October 18, 1853, for stock which was then held by R. & G. L. Schuyler, and were at the time certificates of good stock, but which were afterwards rendered of no value by the transfer of the same stock on the books of the company, by R. & G. L. Schuyler, are declared to be of no value, and are ordered to be canceled, and the holders thereof are to be restrained by injunction in like manner as before directed, viz: [Also omitted.]

The following certificates represent stock that has been transferred by the holders on the books; but as no proof has been furnished to show who are the holders thereof, no judgment can be rendered in regard thereto, viz: [Also omitted.]

The following defendants, who have appeared and answered, have not been shown to be the holders of spurious stock. On the contrary, the stock held by them has been found good, according to the rules adopted by the court, and as to them judgment must be rendered in their favor, with costs: R. H. Arkenburgh, Anna Maria Clarkson, A. B. Davis, John H. Dykers, Alfred S. Fraser, Lorenzo Hull, William H. King,

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John M. Knox, George M. Mead, William H. Rogers, A. D. Wyckoff, Rush Tuller, J. H. Whitson and Charles Wright.

The defendants Duncan, Sherman & Co. having disclaimed any title to the stock standing in their name, and disclosed the name of the owner, no judgment can be rendered as to them, and the complaint as against them is dismissed, with costs.

As to the costs of the other parties plaintiffs and defendants, no costs are awarded to either; but the judgment, as far as rendered in favor of the plaintiffs, is without costs.

[NEW YORK SPECIAL TERM, March 5, 1860. *Ingraham*, Justice.]

HUNTLEY, receiver &c.. vs. PERRY.

A policy of insurance is not rendered absolutely void by the omission of the assured to specify in his application, all the buildings within ten rods of the insured property, but it is merely voidable at the election of the company. GROVER, J. dissented.

After the company has chosen to assert the validity of the policy, by bringing an action upon the premium note, to recover an assessment, the insured cannot be permitted to set up the falsity of his own statements, in the application, as a defense.

THIS action was brought by the plaintiff, as receiver of the Cattaraugus Mutual Insurance Company, upon a premium note given for a policy of insurance issued by that company. The note, application and policy bore date December 6, 1854. The action came on to be tried at the Cattaraugus circuit in January, 1860, before Mr. Justice GROVER and a jury. The plaintiff proved the facts entitling him *prima facie* to recover. The defendant proved the execution of the application, (which by the terms of the policy formed a part of it,) containing in substance a statement that all buildings within ten rods of the insured property were mentioned in it; and then offered to show that the buildings of three persons, which were situated within less

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than ten rods, were not mentioned in the application, and that the omission to mention them was not willful or fraudulent. The evidence was admitted by the court, and the plaintiff duly excepted.

The court charged the jury "that the fact that there were other buildings that were not mentioned in the defendant's application for insurance, within ten rods of the house insured, rendered the premium note, upon which the plaintiff had brought his action, void." To this charge the plaintiff duly excepted. The jury rendered a verdict for the defendant; and the exceptions were ordered to be heard at the general term, in the first instance.

Lamb & Huntley, for the plaintiff.

C. C. Torrance, for the defendant.

By the Court, DAVIS, J. The question to be passed upon in this case arises upon the charge of the court, which was "that the fact that there were other buildings that were not mentioned in the defendant's application for insurance, within ten rods of the house insured, rendered the premium note void." The application set forth in the answer and proved on the trial, is a complete instrument on its face. It purports to state the relative situation of the property insured, "as to other buildings, and the distance from each within ten rods," and that all buildings within ten rods are mentioned, and that there is nothing whatever in it to indicate that it does not do so. This application was made and subscribed by the insured, and is, as it professes to be, *his statement* of the facts required by the company. It was received by the company in good faith, and acted upon by its officers in conformity to its by-laws, and a policy thereon issued to the defendant. The application, premium note and policy were all dated the 6th of December, 1854; and so far as the case shows, have been regarded by both parties as valid instru-

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ments, until the defendant was called upon in this action to pay the assessment on his premium note. It does not appear that at any time during this period the insured has disclosed the fact to the company that he had omitted to state that other buildings existed within ten rods, or that the company became apprised of it in any other way.

It has been held that the answer of the applicant to an interrogatory in an application like this, is an express warranty that there are no other buildings within ten rods, than those mentioned by him. (*Chaffee v. The Cat. Mutual Ins. Co.*, 18 N. Y. Rep. 376.) And a warranty in relation to the situation of the property is a condition precedent, and unless substantially true the policy will be void. (*Id.* 2 Comst. 221. 16 Wend. 481, and cases cited. 18 N. Y. Rep. 378.) But it is also well settled that the company may waive the conditions of assurance, and if they do so with knowledge of the facts they are estopped from denying the validity of the policy. (*Ames v. The Union Ins. Co.*, 14 N. Y. Rep. 254, 256. *Frost v. Saratoga Ins. Co.*, 5 Denio, 154. *Viall v. The Genesee Mutual*, 19 Barb. 440. *Risley v. The Chaut. Co. Mut. Ins. Co.*, MS. opin. 8 dist.)

In *Frost v. The Saratoga Mutual Insurance Company*, the action was brought upon the policy after a loss. The company showed that the application omitted to state buildings within ten rods, as required by the conditions of the insurance; but it appeared that the company, with full knowledge of the omission and of the facts of the case, had afterward made and collected assessments upon the premium note, and the court held that the company had by this act affirmed the validity of the policy, and could not be heard to dispute it.

In *Risley v. The Chautauque Company*, this court held that the making and collection of assessments, after notice of the facts, was a waiver of conditions precedent, and subjected the company to pay a subsequent loss, although the

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policy was originally void within the well settled cases, if the company had chosen so to regard it.

The language used by the cases is that the policy is void; but to my mind it is quite clear that nothing farther is meant by this expression than that it is voidable if the company choose so to regard it. The cases just cited establish that the policy is capable of being made valid by the act or agreement of the company, after the facts which avoid it shall have come to their knowledge; and these cases satisfactorily establish that the policy is to be regarded rather as voidable at the election of the company than as absolutely void, whether they choose so to regard it or not. Those cases settle that if the fact, that the defendant had omitted the buildings now shown to have been left out, had come to the knowledge of the company, they would have had their option to have treated the policy as a valid or as a void one; and in the former case would have themselves been estopped from afterward questioning its validity. In my opinion, therefore, the defendant is not at liberty to assert the misrepresentations of his own application as a defense to his note. The company chose, by their action, to assert its validity. The payment of his assessment, which is according to the express terms of his agreement, secures to the insured a valid insurance, and after the collection of the assessment upon this note the company cannot be heard to dispute their liability for any loss he may sustain. The company have been at all times since the making of the application, and the issuing of the policy, in a position to have ratified and rendered valid the policy, upon a disclosure of the facts, by a waiver of the condition, and that this has not before been done, is the fault of the insured rather than of the company. The election, in my judgment, was with them; and the defendant has neither reason nor right to complain at their so exercising it as to subject him and themselves to the liabilities which both parties intended to incur.

I am not able to see, also, why the insured in such a case

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is not estopped from setting up such a defense. His representation in writing is perfect upon its face. It is made with intent to induce the company to act upon it, and issue their policy to him. The company, relying upon the representations it contained, did act upon it and issue their policy to him. This action is necessarily to their prejudice, for although they may avoid their policy by proving the warranty false, yet they take upon themselves the burthen of doing so by issuing an obligation which is *prima facie* binding upon them. The insured has, therefore, by his own act, led them into a position where they must pay his losses or prove his misrepresentations. And by this act he is the gainer, for he has secured a policy on terms which must be presumed to be more favorable than would have been granted had the facts been known and truly stated. Now shall he be permitted to set up his own misrepresentation as a defense, where the company are asserting the validity of the policy and seeking to enforce the consideration he agreed to pay for it? Under such circumstances, I think, the defendant should not be permitted to assert the falsity of his own statements upon which the company have in good faith acted; although he may have made the statements by mistake or accident. "It makes no difference in the operation of this rule whether the thing admitted was true or false, it being the fact that it has been acted upon that renders it conclusive." (1 *Greenl. Ev.* §§ 208, 209. *Frost v. Saratoga Mutual*, 5 *Denio*, 158.) The case is brought, in my opinion, within the careful rule laid down by Bronson, J. in his dissenting opinion in *Desell v. Odell*, (3 *Hill*, 220.) "Before the party is concluded, it must appear," he says, "1. That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up. 2. That the other party has acted upon the admission; and 3. That he will be injured by allowing the truth of the admission to be disproved."

The defendant made his admission in the form of a solemn

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statement, which the law adjudges to be an express warranty of existing facts. 2. The company, believing and relying upon that statement, acted upon it; and 3. They will now be injured by allowing the insured to assert the falsity of his statement.

To hold that the defense relied upon is a valid one, would throw doubt and insecurity over all the obligations held by the mutual insurance companies of the state. Their premium notes will cease to be of value as securities if every maker may resist their payment by the assertion of his own wrong, in concealing or misrepresenting the facts relative to his property.

There should be a new trial in this case, with costs to abide the event.

MARVIN, J. concurred.

GROVER, J. dissented.

New trial ordered.

[ERIE GENERAL TERM, May 14, 1860. *Marvin, Davis and Grover*, Justices.]

MERRICK and others vs. BRAINARD and others.

A *carrier* can maintain an action in his own name, for an injury done to property intrusted to him to be carried; and in such action he may recover the value, which he will hold in trust for the owner.

The owners of a tow boat, undertaking to tow another boat, are, in the absence of an express contract limiting their liability, bound to exercise ordinary care and diligence, and are liable for the want thereof.

When a carrier of goods employs a tow boat to tow his vessel, and those in charge of the tow boat are guilty of negligence, whereby damage is done to the goods, and the carrier has not excepted in his contract such risks, he is liable to the owners of the goods, for such negligence, on the principle of responsibility for the acts and neglects of his agent. And this liability over to the owners will enable him to maintain an action against the proprietors of the tow boat.

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The right of action for an injury done to goods by a person whom the carrier has employed to tow his boat containing them, may be assigned by the carrier to another.

A right of action for a tort is assignable, and in an action brought by the assignee, the assignment being, on its face, valid, the defendants have nothing to do with the question of consideration.

Although a partner cannot, ordinarily, through a sale of his interest in the partnership, introduce the purchaser into the firm as a copartner, without the consent of the other members, yet there is no law which prohibits a partner from selling out his interest in the partnership.

Where, by the partnership agreement, it is provided that the interests of the partners shall be transferable, and may be transferred at the will of each partner, and that the purchaser shall be clothed with all the rights of his vendor, a transfer of the interest of a partner will work no dissolution, and the purchaser becomes to all intents and purposes a partner; and, as between the partner selling or assigning his interest and his copartners, the former will cease to be a partner, or to be liable as such.

A foreign corporation, migrating to this state and carrying on its business here, exclusively, and ceasing to transact any business in the state of its creation, loses its corporate rights and privileges, and becomes, as to all persons dealing with it, a mere partnership.

A stockholder in such a corporation is liable as a partner, in the association or partnership which the stockholders become, on the termination of the corporation. MORGAN, J. dissented.

In an action against the owners of a tow boat, for an injury done to the goods they have undertaken to transport, through their negligence, the defendants are not entitled to claim any deduction for so much of the loss as was covered by insurance.

A PPEAL from a judgment rendered at the circuit. The action was brought to recover for damages sustained by the negligence of the defendants' servants and agents in towing the canal boat Camden from New York to Albany, by means whereof said boat and her cargo were injured by being forced upon a rock, in the Hudson river. Vandewater Brothers were common carriers on the Hudson river and Erie canal, and as such were employed by the plaintiffs and others to carry certain merchandise from New York to Albany and places north and west of that city. Vandewater Brothers owned the boat Camden, and caused to be shipped thereon a large quantity of goods owned by the plaintiffs and others.

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The defendant Brainard was one of the proprietors of the Albany and New York towing line of steamboats, and the defendant Van Santvoord was one of the stockholders and a director and agent of a corporation created by the state of Connecticut, called the Steam Navigation Company. This corporation had chartered and employed the tow boat Cayuga, which was owned by the association of which the defendant Brainard was agent and in which he was a partner. The Camden was taken in tow by the Cayuga under a contract to tow her to Albany, and during the voyage the loss for which the action was brought occurred.

Vandewater Brothers were indebted to the plaintiffs for moneys advanced, and to pay such advances assigned to the plaintiffs the claim against the defendants, for the injury to the Camden and the goods therein.

The cause was tried before Justice ALLEN, without a jury, at the Oswego circuit, in March, 1856. The court found the facts above stated, and that the injury to the Camden and the goods therein was caused by the negligence of those in charge of the tow boat Cayuga, and that the defendants were liable to the plaintiffs for the damages sustained by such negligence, amounting to the sum of \$6846.56.

The court held, as matter of law: 1st. That Vandewater Brothers had a right of action against the defendants for the injury done to the Camden and her cargo. 2d. That such right of action was assignable. 3d. That the plaintiffs as their assignees could sue and recover. 4th. That the Steam Navigation Company having been created by the laws of Connecticut, and having transferred its whole business operations to this state, except holding meetings to elect directors, ceased to be a corporation within this state, and hence the defendant Van Santvoord, being a stockholder therein, was liable as a partner in the association or partnership which the stockholders became, on the termination of the corporation.

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C. Van Santvoord, for the appellant.

Henry A. Foster, for the respondent.

MULLIN, J. The importance of this case, as well by reason of the amount claimed as of the principles of law involved, makes it proper and necessary that it should receive a careful examination.

The first question presented for consideration is, whether the plaintiffs can in law maintain this action; and this involves three other questions: 1st. Whether there was any right of action in Vandewater Brothers, the assignors of the plaintiffs. 2d. Whether, if there was, it was assignable. 3d. Whether it has been assigned so as to vest any interest in the plaintiffs.

Vandewater Brothers were common carriers of merchandise between the cities of New York and Oswego, and owned the canal boat Camden. In September, 1851, said firm contracted with an association of persons who had in their employ the tow boat Cayuga, to tow said canal boat Camden, with merchandise, from New York to Albany, for a compensation then and there agreed to be paid. Said tow boat took the Camden in tow and started on her voyage, and during said voyage, through the carelessness, as it is alleged, of those navigating the tow boat, the Camden was thrown on the rocks in the Hudson river and sunk, whereby she and her cargo were injured. The property on board the Camden was owned by sundry individuals, under contracts with whom Vandewater Brothers were carrying said goods at the time of the injury to said boat.

It is said in 1 *Chitty's Plead.* 48, that though at the time when the injury was committed the goods were in the actual possession of a servant, *carrier*, or other bailee, yet if the general owner had the right of immediate possession the action may be in his name, or it may be in the name of the

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person having actual possession at the time of the injury but only a special property, as by a factor, a carrier, a pawnbroker and but a mere servant.

It is further insisted that the plaintiffs cannot maintain the action, because one of the assignors was a partner in one of the lines that chartered the Cayuga, and therefore liable to contribute to the loss.

It is found by the referee that Vandewater, who was a partner in the Albany and New York towing company, had sold his interest therein to Mr. Meeks before the accident in question. It then comes to this: Can a partner dispose of his interest in the partnership, and thereafter prosecute the partners for a cause of action arising subsequent to the transfer? I know of no law which prohibits a partner from selling out his interest in the partnership. He cannot, ordinarily, through such sale, introduce the purchaser into the firm as a copartner, without the consent of the other partners. But that such a sale will transfer the interest of the partner selling, I have no doubt. In *Marquand v. The New York Manufacturing Co.*, (17 John. 525,) it was held that a *bona fide* assignment by one of several partners, of all his interest in the copartnership stock &c., *ipso facto* dissolves the partnership, notwithstanding it was provided by the articles that the partnership should continue until two of the partners should demand a dissolution. And it was further held, in that case, that the assignee of the interest of the partner is entitled to an account of the profits, and to the share of such profits of the assignor. (1 *Parsons on Contracts*, 130 and note, 170, 171.)

From the manner provided for the transfer of the interests of partners in the forwarding lines that chartered the steamer Cayuga, it is quite clear that the interest of the persons forming such associations should be transferable, and might be transferred at the will of the partner; and that the purchaser should be clothed with all the rights of the person from

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whom he acquired his interest. Under such an arrangement a transfer of interest brought no dissolution, and the purchaser became to all intents and purposes a partner. As between the members of the association then, the partner who sold or assigned his interest and the other partners, the former ceased to be liable as a partner. But as between the retiring partner and third persons, dealing with the firm with knowledge that he was a partner, different consequences may arise.

The question is not here whether Vandewater may not be liable to third persons as a partner, but whether on a given day he was in fact a partner in the Albany and New York line. It being competent for him to transfer his interest, and he having done so in fact, by a valid conveyance, he was not a partner at the time of the happening of the injury for which this action is brought.

The assignor having a right of action, it was assignable. (*Hall v. Robinson*, 2 *Comst.* 293.) The defendants have nothing to do with the question of consideration. The assignment is, on its face, valid, and whether it was transferred for value, or was a gift to the defendants, is wholly immaterial.

The next question is, were the defendants liable to respond to the plaintiffs for the damages resulting from the injury of the vessel.

If the defendants are liable it is because they are stockholders in the Steam Navigation Company, a corporation created by the legislature of Connecticut, in 1825. And as the stockholders of that corporation are not personally liable for the debts of the corporation, the defendants are not personally responsible for the damages claimed in this case, as such *stockholders*. The ground of liability insisted upon by the plaintiffs is that inasmuch as the corporation had ceased to carry on the business in the state of Connecticut, and had removed its whole operations to this state, except the formal business of electing its officers, the corporate functions ceased,

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and the stockholders became liable in this state, as *partners*, for the debts of the company.

The question then is reduced to this: Does a corporation created by another state lose its corporate rights and privileges when it ceases to transact business in the state of creation, and carries on its business exclusively in the state to which it has removed?

It is not in the power of one government to grant rights or privileges which may be asserted or exercised, or impose duties which may be performed, within the limits of another government, without its consent. If a foreign corporation comes into this state and exercises any of its corporate functions, it is not by virtue of the powers conferred by its charter, but by the comity of this state. In the exercise of this comity, our courts are constantly engaged in the hearing of causes brought by foreign corporations, and in issuing process in their behalf against the property of other foreign corporations, and in the trial of causes in which they are defendants. These proceedings being conducted in the corporate name, they are an unequivocal recognition of the valid existence of such foreign corporations in this state.

If we entertain jurisdiction in cases in which foreign corporations are parties, thus giving effect to the law of the government that created them, we must in justice recognize and enforce the provisions of their charters. The rights conferred by such charters must be yielded to them, and the duties thereby imposed must be enforced against them. In other words, such corporations can exercise in this state no power not conferred by their charters. I do not mean by this that our courts or officers will assume to enforce against such corporations forfeiture of their corporate franchises which may be imposed by the charter for the abuse by such corporation of such franchises. What I do mean to say is that our courts will see that the acts done by the corporation, and which form the subject matter of the action are within the powers conferred upon it by its charter, and that all the

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duties imposed upon it for the benefit of those dealing with it, and the observance of which is necessary to the protection of third persons, are fully and duly performed.

But it is said that this comity does not extend or apply to a foreign corporation that has no existence in fact in the state creating it, and its existence, if at all, is within this state. According to this doctrine, the corporation may be a valid and subsisting corporation in the state in which it was chartered, and yet, because its business has been transferred to another state, it has ceased to be within the principles of comity above alluded to, and which only extend, it is said, to corporations whose business is transacted where it was brought into being.

In *Angell & Ames on Corporations*, § 104, it is said "a private corporation whose charter has been granted by one state, cannot hold meetings, pass votes and exercise powers in another state. It can have no legal existence out of the boundaries of the sovereignty by which it was created, must dwell in the place of its creation, and cannot migrate to another sovereignty."

In the *Bank of Augusta v. Earle*, (13 Peters, 588,) Chief Justice Taney says: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law, and by force of the law; and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." The same doctrine is again asserted by the supreme court of the United States in *Runyon v. The Lessee of Coste*, (14 Peters, 122, 129.) See also *McCall v. Byram Manufacturing Co.*, (6 Conn. Rep. 428.)

In *Bard v. Poole*, (2 Kern. 495,) Denio, J. delivering the opinion of the court, says: "They (corporations) are beings existing only in contemplation of law, and have no other attributes than such as the law confers upon them;

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and as the laws of a country have, in general, no extra territorial operation, a corporation cannot challenge, as a matter of right, the privilege of dealing in a country not under the jurisdiction of the sovereignty which created it."

While the foregoing cases, and others which might be cited, assert the general propositions that a corporation can have no legal existence beyond the limits of the state or country creating it, and that it must dwell in the place of its creation, and cannot migrate, yet the courts follow them up with important qualifications. In *Bard v. Poole*, cited supra, Judge Denio says: "But in the absence of laws of that character, (laws interdicting foreign corporations from performing certain single acts or conducting a particular description of business within its jurisdiction,) or in regard to transactions not within the purview of any prohibitory law and not inconsistent with the policy of the state as indicated by the general scope of its laws or institutions, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other states.

In the *Bank of Augusta v. Earle*, cited supra, Chief Justice Taney says: "But although it (the corporation) must live and have its being in that state only, [in which it was created,] yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible, yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court."

When, therefore, a foreign corporation brings an action in one of our courts, we do not stop to inquire whether it has removed from the state in which it was created, or whether there is any other legal objection to the maintenance of the action, but on the principles of comity we entertain the

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action, and leave it for the defendant to allege the reasons why the action may not be maintained. If in such case it should be established that the corporation created by the laws of Connecticut had removed its entire business to New York, we could not take away its corporate franchises. That could only be done in the state in which it was created. And that state not having so declared, we must treat it as a valid and subsisting corporation, unless the mere act of removing its business to this state is illegal and terminates, *ipso facto*, the existence of the corporation, in this state.

In none of the cases cited has any such effect as that just mentioned been alluded to as resulting from the removal into another state of the entire business of a corporation. But if a corporation created in another state can transfer to this state the whole of its business and transact the same here, under the principles of comity above alluded to, then not only is our own legislature rendered useless and unnecessary, at least so far as the creation of corporations is concerned, but all the states in the union and all the legislatures in christendom can create and let loose upon us a multitude of these corporations more destructive and pernicious than the frogs and lice let loose on the Egyptians.

It will not answer, then, to carry the doctrine of comity to this absurd extent. We have shown our respect for our sister states and for foreign governments when we have permitted corporations created by them to come into our state and make contracts and transact any other lawful branch of business, and to use our courts for the enforcement of their rights, while they remain in the place of their creation, without allowing them to become by their own act domestic corporations. Such must have been the view of Judge Denio in *Bard v. Poole*, (2 Kern. 507,) when he says: "I consider that it would be a violation of our sovereignty for a foreign corporation to remove from the country or state where it was created, to locate itself wholly in this state." The violation of our sovereignty would be a matter of very

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little moment if, after it was done, our courts would still give effect to their contracts."

It is said it is not within the province of the courts to withhold from a foreign corporation the right to the protection of its charter, so long as the legislature has not asserted its sovereignty and excluded the corporation. In other words, it is insisted that until the legislature has forbidden the courts to give effect to the rights of a foreign corporation under its charter, it is their duty to extend to them the same protection as to domestic corporations.

The courts do not take cognizance of actions by and against foreign corporations, by virtue of any legislative enactment, but on the ground of comity; and that comity must be extended to them, under certain restrictions and limitations, until forbidden by the legislature. *Story*, in his *Conflict of Laws*, page 37, says: "In the absence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the court, but of the nation, which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided. It is for the courts, therefore, to give effect to this comity, and to form their own judgments of what the state or nation can or cannot do, and it rests solely with them to determine whether effect can be given to foreign laws without prejudice to their own national rights and interests." (*Conf. of Laws*, 33 to 37.)

The question then comes to this: Is it consistent with the rights and interests of the people of this state to permit foreign corporations to immigrate into this state and exercise, within it, all their corporate powers? It cannot be necessary to attempt an enumeration of the evils which would result from domesticating corporations over whose creation and conduct we can have no control. They would be with-

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out limit as to number, without capital, competing with and unfairly excluding our own citizens from a share in the business of the country, or by combinations aided by aggregated wealth, not only exclude our people from a share in the business of the state, but wield a dangerous influence over our financial and commercial interests.

It seems to me that we must in self-defense declare that a corporation that thus migrates into our state loses its corporate rights, and becomes, as to all persons dealing with it, a mere partnership.

I think the learned justice was right in holding Van Santvoord to be a joint charterer of the steamer Cayuga, and liable as such for whatever injuries were done by her to the Camden.

If the defendants are liable for damages done by the Cayuga or those who were in charge of her, it remains to inquire for what acts they are thus liable, and whether, on the evidence, such liability is established.

It seems to me that this is one of those cases in which the decision of a judge or referee ought not to be disturbed, unless the finding is clearly against the evidence. There is conflicting evidence, and the judge, with the witnesses before him, and with a more perfect knowledge of the facts than we can hope to acquire from these papers, has found the defendants liable, and it is fit and proper that a finding of facts should not be disturbed. But the party is entitled to an examination by us, in order to ascertain whether his allegation that the finding is erroneous is not true; and with this view I have gone through the evidence.

One who contracts to tow a boat laden with merchandise, for another, is not a carrier, and does not assume, nor is he charged with, the duties and responsibilities of a carrier. (*Wells v. Steam Nav. Co.*, 2 Comst. 204.) In the same case, (4 Selden, 375,) it was held that the owners of a tow boat, in the absence of an express contract, limiting their

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liability, are bound to exercise ordinary care and diligence, and are liable for the want thereof.

Such being the standard of liability, let us inquire whether there was evidence in the case which tended to charge the defendant with negligence in the navigation of the Cayuga, whereby the injury complained of occurred. The Camden, on board of which the merchandise was laden, was in good order, properly manned and equipped for the voyage. The plaintiffs' witnesses testify, in substance, that the night was a clear one; the pile of stones on which the vessel struck was well known; there was a sufficient width of channel, and depth of water, to navigate the tow; that the channel was unobstructed by vessels; and that the steamer was carried too near the west shore; and that by reason of passing beyond the proper place in the channel, the accident occurred. Upon this evidence, standing alone, it cannot be claimed that negligence is not proved.

To rebut this evidence, and excuse the misfortune, the defendants' witnesses swear that while it was clear overhead, it was hazy on the shore, so as to deceive pilots as to the distance of the vessel from the shore; that there were two vessels in the channel, one at anchor below the lighthouse point, and the other afloat just above, and between it and the southwest point of the middle, and in the effort to escape the latter the Cayuga steered sharp to the west, and in the effort to straighten up the channel, and deceived by the haze, she was carried too near the west shore, and the injury occurred. There are two witnesses on the part of the defendants that swear to there being two vessels in the channel, that night. There are six on the part of the plaintiffs who swear that they were in a situation to see the channel, and discovered no vessels. Three or four of the defendants' witnesses swear to the existence of a fog on the shore. The plaintiffs' witnesses discovered no such thing. The effect of Nye's evidence, which doubtless had great weight in the opinion of the judge at the circuit, is attempted to be shaken

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or done away by the oaths of two or three witnesses on the part of the defendants, who swear that in their opinion Nye could not see from the deck of his vessel how near the vessel was to the shore. But one fact is worthy of remark; that if he could not see, he guessed with astonishing accuracy. It would seem that just as he was in the act of remarking how dangerous it was for the vessel to run so close to the shore, the whistle sounded which was the evidence of the accident.

It is said that the hands on the Camden were guilty of negligence in not porting their helm, when ordered by the master of the Cayuga, just before the accident. The hands on board the Camden appear to have been men unaccustomed to the navigation of the river, and as to what duties it was necessary or proper for them to perform on board of that vessel while in tow. But if any duty was required of them to whom the safety of the vessel was intrusted, it was the duty of those on board the steamer to have informed them, and thus put upon them the responsibilities which might result from neglect. It is quite obvious that a man should be on deck of the boat in tow, during the voyage, to perform such services, and guard against such accidents, as vessels in tow are subject to or require. It appears that one man was on deck, as I understand the evidence, all the time. It further appears that no order was heard from the steamer, before the accident, requiring those on board of the Camden to do any thing in reference to that vessel. There was clearly no negligence imputable to the plaintiffs, under such circumstances.

It must be obvious to any one reading the testimony, that there was a conflict of evidence upon all the material facts in reference to the accident, and that the conclusion which the referee has drawn is the legitimate one, from the evidence.

The only remaining question to be considered, is one of damages. And in examining this, I shall confine myself to the specific objections taken by the defendants' counsel, as the question is one so peculiarly within the province of the referee

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to decide that the court could not, if it would, go into a review of the whole evidence on that question.

I have already attempted to show upon authority that a carrier can maintain an action in his own name, for damages done to property intrusted to him to be carried. But the defendants say that although this may be the general rule, yet in this case the goods being the property of third persons, and as Vandewater Brothers could not sell the goods, themselves, they could not for the same reasons sell the claim for the damages arising from injury to them. If this proposition is sound, it sweeps away the doctrine which I have shown is conclusively established, that the carrier *may* sue for an injury to the goods, and in such action may recover the value, and that he holds such value in trust for the owner.

Again; so far as the right of action rests on contract, the contract is between the carrier and the charterers of the steamer, and there is no privity of contract between the owners and the charterers.

The right of action, then, being in the carrier, he has the right to assign it. No authority has been shown, nor reason given, why he may not sell or assign his claim. As carrier he has only the custody of the goods; it is a breach of duty to use or dispose of them; but when a right of action accrues by reason of interference with his possession, or of injury to the goods, the right is in law his, and he stands answerable over to the owner for the value of the goods in the one case, or the damages incurred, in the other.

It is further insisted that as to so much of the property injured in this case as belonged to owners between whom and the carriers there was an agreement exempting the latter from liability in certain cases, the plaintiffs were not entitled to recover, as the carrier was not liable over to the owners. This proposition assumes a fact not proven; to wit, that by virtue of any contract the carriers were not liable for the injury resulting from the sinking of this boat. I concede that if the boat was sunk by reason of the perils of the navigation

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and without the fault of the carrier, then he is not liable, and in the same event the defendants are not liable to either the carriers or owners. But when a carrier employs a tow boat to tow his vessel from New York to Albany, and those in charge of the tow boat are guilty of negligence whereby damage is done to the property, and the carrier has not excepted in his contract such risks, then he is liable to the owners for such negligence. The tow boat is his agent; its acts and neglects are his; and he must bear the consequences, in obedience to the maxim *facit per alium facit per se*.

The defendants' counsel further insist that the defendants are not liable for so much of the loss sustained by the sinking of the vessel as was covered by insurance. The defendants did not insure, nor pay for insuring the property, and the question is put to them with considerable force, by what right—upon what principle—they are entitled to any benefit from such insurance.

I insure my furniture in my house; a person either willfully or negligently sets it on fire; and when I demand compensation for my loss, he insists upon his right to deduct the amount for which the property is insured. To say the least of it, the claim is wanting in modesty. But it is said that if I may retain the insurance money, and recover the value of the goods of the wrongdoer, I am the gainer by the accident. If I am, it ill becomes the wrongdoer to complain of it. If I cannot in justice retain more than the value of the property, which of the three parties concerned is entitled to the benefit of the deduction, the injured party, the wrongdoer, or the insurance company? Most clearly the latter. If I have not been paid by the insurance company before I collect of the wrongdoer, I am limited in the amount I am entitled to demand of the company to so much as will, in addition to the damages recovered, make good the loss. And if I have been already paid, the company is equitably entitled to recover so much of the damages as I have received over and above my actual loss. (37 Eng. Ch. Rep. 273. *Yates v.*

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Whyte, 4 Bing. N. C. 272. *Bull v. Fritz*, 12 How. U. S. Rep. 466. *Hovey v. The Steamboat Sarah E. Brown*, decided by Judge Betts, in MS. *Clark v. Inhab. of Blything*, 2 Barn. & Cress. 254. 2 Sand. S. C. Rep. 496.)

After as careful an examination of this case as I have been able to bestow upon it, I am entirely satisfied that the case was properly disposed of at the circuit, upon both the facts and the law. The judgment should therefore be affirmed.

BACON and ALLEN, Justices, concurred.

MORGAN, J. (dissenting.) I concur in the general conclusions of the learned judge upon the several questions involved in this case, except the single one as to the personal liability of Abram Van Santvoord. The Steam Navigation Company was incorporated by the laws of the state of Connecticut, and was one of the *five* companies constituting the towing company, which was a voluntary association engaged in towing boats on the Hudson river between Albany and New York. Abram Van Santvoord was a stockholder of the Connecticut Steam Navigation Company, and one of its directors and agents, residing in the city of New York. The Connecticut company owned the barges known as the Swiftsure line, and this line formed part of the towing company. The principal business of the Connecticut company was done in the city of New York, by its agents residing there, except the formal election of directors. Abram Van Santvoord was not a proprietor in the towing company, except as a shareholder in the Steam Navigation Company of Connecticut. The Connecticut corporation became a proprietor of the Hudson river towing company, in its *corporate capacity*, and Abram Van Santvoord was not otherwise connected with the towing company than as a shareholder in that corporation and one of its agents residing in New York.

The charter of the Steam Navigation Company *exempts*

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the stockholders from *personal* liability for the debts of the corporation.

If the corporation, therefore, was authorized and incorporated by the laws of this state instead of the laws of Connecticut, there would be no ground for making the stockholders individually liable for the damages in this action.

It is suggested by the respondents' counsel that there is evidence to show that he was a proprietor of the towing company, without reference to his stock in the Steam Navigation Company; but that fact is not found by the judge. On the contrary, the counsel of the defendants requested the judge to hold, that as a shareholder in the Steam Navigation Company, he was not liable for the demand for which this action is brought; but the judge declined to hold as requested. It is stated in the opinion of the learned judge that Van Santvoord acted as a corporation, and he is made liable on the ground that he was a stockholder in a foreign corporation, doing business here in its name. We cannot therefore sustain the judgment upon another ground now suggested for the first time in the argument, and upon which there is no finding of fact, as suggested.

Although it is stated in the opinion of the learned judge that Van Santvoord acted as a corporation, the facts as found by him in connection with the documentary evidence do not show that he signed the charter of the Cayuga on behalf of the corporation, or that he assumed to be the corporation, or that he was a party to the contract of the towing company except as one of the stockholders of a foreign corporation, and one of the agents of the corporation in the transaction of its corporate business in this state.

The plaintiff, to maintain this action, is obliged to bring forward the Steam Navigation Company of Connecticut and show that it was one of the contracting parties. Prima facie, that corporation is liable—for its name appears among the proprietors of the Hudson Steam Company. Mr. Van Santvoord did not put his name there, nor did he sign the

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name of the Steam Navigation Company to the charter, but he was a stockholder and one of its agents in New York city. As agent alone, it is not sought to make him personally liable for the contracts of a foreign corporation, for he did not put its name to the charter. Nor is it suggested that the corporation did not authorize the contract with the Vandewater, so far at least as a foreign corporation could authorize the transaction of business in this state.

It is admitted that if the Steam Navigation Company had remained at home, it could have made a valid contract in this state, and could sue and be sued in our courts as an artificial person. Although not expressly decided in this state, I think it is implied that, in such a case, the corporation, and not the stockholders, would be alone liable on the contract in question. (2 *Kern.* 495, 569. 20 *Wend.* 614.)

But it is claimed that this Steam Navigation Company has emigrated and taken up its abode in the city of New York, and that except the mere election of directors, its whole business is transacted here instead of Connecticut. And upon this ground the learned judge held, that by the comity of nations as administered in this state, our courts will not recognize its existence as a corporation. Judge Denio, in *Bard v. Poole*, (2 *Kernan* 507,) says: "I concede that it would be a violation of our sovereignty for a foreign corporation to remove from the country or state where it was created, to locate itself wholly within this state." Chief Justice Taney, in the *Bank of Augusta v. Earle*, (13 *Peters*, 519,) says: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law and by force of the law, and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot emigrate to another sovereignty." In the case of *The People v. The Trustees of Geneva College*, (5 *Wend.* 211,) it was

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decided that the corporation could exercise no powers beyond the place to which it is restricted by its charter.

Notwithstanding what is said by Judge Denio in *Bard v. Poole*, the court held in that case, that a foreign corporation may make and enforce within this state contracts which by its charter it is competent to enter into, and which are not forbidden by the laws or contrary to the policy of this state; and that a loan made in this state by the American Life Insurance and Trust Company, incorporated by the legislature of Maryland, and which was secured by a mortgage upon real estate in this state, was valid, and could be enforced here. The remark of Judge Denio, above quoted, was therefore a general one, without any practical illustration to give it point.

In the *Bank of Augusta v. Earle*, the same doctrine was declared, but the plaintiffs were permitted to sue and recover on bills of exchange in Alabama, discounted by the agents of the plaintiffs in Mobile, Alabama. The plaintiffs' bank was located at Augusta, Georgia, and incorporated by the legislature of that state. What was said in the opinion of Chief Justice Taney in that case as to the migration of a corporation from one sovereignty into another, was asserted as a general proposition, but not in a case where the rule, if admitted, could be made available.

The question in *The People v. The Trustees of Geneva College* arose upon a *quo warranto*, and was decided upon the express ground that the *charter restricted the location* to Geneva, and that it was a matter affecting the public at large. The judgment divested the trustees of certain corporate powers which they exercised in the city of New York, upon the ground that it was a usurpation of a franchise. It will be seen that the question was not decided, whether an individual who had made a contract with the corporation, beyond the limits of its authority, could enforce it against the corporation, or against the individual corporators, or against either.

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It may be assumed that if the Steam Navigation Company had done any act which the laws of this state had forbidden to be done by any corporation or by any association of individuals, without express authority of law, no suit could be maintained by it founded upon such act or any obligation growing out of it, express or implied. The statutes of this state have regulated and defined the principles of international law or international comity applicable to foreign corporations attempting to enforce contracts made by them, in this state. (2 R. S. 457, § 2.) Can our courts go further and deny such a corporation the protection of law, merely because it has confined its principal business to this state?

If they do not engage in acts *opposed to the policy of the law or condemned by the legislature*, it would seem as if they were entitled to the protection of the courts.

If I understand the effect of the decision in this case, it virtually outlaws this corporation, not because it is engaged in an improper business, but because it confined its business to the state of New York, except the formal election of its officers. Doubtless, according to the doctrine as enunciated by the judges in some of the cases cited, this Steam Navigation Company cannot change its location to this state. This would seem, however, to be more a question of law than of fact. It cannot, says Chief Justice Taney, have a *legal existence* out of the boundaries of the sovereignty by which it is created. But by international comity in some states, *and by force of the revised statutes in this state*, the legal existence of a foreign corporation is recognized by the courts, although that existence depends upon the legislature of another state. Its contracts, when not opposed to the policy of our laws, may be enforced in this state. This Steam Navigation Company owns several barges in this state. Suppose a stranger should seize them and the navigation company should bring a suit for the wrong, in its corporate name? Could the defendant defend such a suit on the ground that the Steam Navigation Company was outlawed in this state,

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because its chief business was done in the city of New York instead of Connecticut? Would this court try such a question as a question of fact in such an action? Would it even listen to the objection? If the question can be raised at all, I think it must be raised by *quo warranto*, or in a direct proceeding to test it, and that the inquiry will be by what authority the persons engaged in the business exercise the franchises of a corporation in this state. After judgment of *ouster*, and not before, could the objection be taken in a private suit between such a corporation and a person who had contracted with it in a matter not forbidden by the laws of the land. Such would certainly be the rule in respect to domestic corporations, which had forfeited their franchises. (*Slee v. Bloom*, 19 *John*. 456. *S. C.*, 5 *John*. Ch. 366. *Mech. Ch. Building Association v. Stevens*, 5 *Duer*, 676. And see *U. S. Bank v. Stearns*, 15 *Wend*. 315, 316, *Savage*, Ch. J.; *McFarlan v. The Triton Ins. Co.*, 4 *Denio*, 397, *Bronson*, Ch. J.; *Meth. Epis. Union Church v. Pickett*, 19 *N. Y. Rep.* 485, *Selden*, J.) In *McFarlan v. The Triton Ins. Co.*, above cited, *Bronson*, Ch. J. remarked, that it was "unnecessary to inquire what may be the rights of the people in relation to this corporation; or as against the individuals who were engaged in getting it up and setting it in motion. The defendant does not represent the sovereign power, and has nothing to do with the question whether the company should be dissolved. So long as the state does not interfere, the company may sue or do any other lawful act, whatever sins may have been committed in bringing the body into existence." Is there any difference in the principle when the corporation is created by the laws of another state? The evidence of the right of a foreign corporation to sue in our courts, is substantially the same as in case of a domestic corporation. (*U. S. Bank v. Stevens*, above cited.) If it misbehaves itself, so as to forfeit the protection of our laws, how is the question to be met? Here it is claimed that the Steam Navigation Company, although having a charter regu-

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larly granted by the legislature of Connecticut, has abused its franchises by locating its agents in the city of New York, and transacting the principal part of its business in this state. It is admitted that it cannot emigrate into this state; but this does not necessarily imply any thing more than that it is *legally* impossible for the corporation thus to emigrate. It may do business in this state through its authorized agents residing here. This is conceded. It may then claim the protection of the courts; may sue and be sued in its corporate entity, and may enforce its contracts, when they do not contravene our laws. (*Cary v. Cleveland and Toledo R. R. Co.*, 29 Barb. 51, 52, *Allen, J.*) In these respects it stands upon as favorable ground as though it had been chartered here. Who is to determine when it has gone too far in confining its business to this state, and what should be the limit of our forbearance? I think if there is a limit beyond which it cannot go, without subjecting itself to the charge of having *emigrated* into another sovereignty, and of having exercised franchises here which cannot be tolerated by the comity or law of the state into which it has emigrated, that it is for the sovereign power to decide upon the usurpation, and not for the defendant, who is sued upon a contract which he has made with it in its corporate name.

Assuming, therefore, that a foreign corporation, as well as a domestic one, may exercise its franchises until it is dissolved, or has surrendered them, or has been deprived of them by judgment of law, and that an individual dealing with it cannot dispute its corporate existence, when sued upon his contracts made with it within the scope of its general powers, and not objectionable in other respects as against the policy of the laws authorizing it to transact business in this state, there is no sufficient ground upon which we can deny to the Steam Navigation Company the privileges and immunities which the statute gives to any other foreign corporation, doing business in this state. In *The Bank of Augusta v. Earle*, (13 Peters, 519,) the court held that

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"whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members."

In *Ex parte Van Riper*, (20 Wend. 617,) Judge Cowen looked into the charter of the Manufacturers' Bank of Belleville, New Jersey, to determine the personal liability of one of the directors, and says: "No doubt a state may pass a law tying a creditor up to a certain remedy on a contract, where the law is passed prior to the contract being made. As the creditor then knew the law, he contracts *cum onere*."

I think Van Santvoord is not, therefore, individually liable upon the contract in question, and that the learned judge erred in allowing the plaintiffs in this action to avail themselves of a principle of law, which could only be invoked on behalf of the state whose sovereignty was encroached upon by persons coming here under the protection of a charter granted to them by another state. It is not without considerable hesitation that I have arrived at this result; but in the absence of any express adjudication to the contrary, so far as I can discover, I think that a party who contracts with a foreign corporation, having a legal and valid charter in the state which grants it, stands in the same position towards it as he does towards a corporation granted by the legislature of this state. The state may, perhaps, proceed by *quo warranto*, and examine by what authority certain persons in New York city exercise the franchises of a foreign corporation within the limits of this state; and if they are violating the laws of comity by the conduct complained of in this case, the court may perhaps give judgment against them and take away their franchises, so far at least as they attempt to exercise any of them here. It may, however, be a grievance which the legislature alone can remedy.

I think the judgment should be reversed and a new trial granted, costs to abide the event. Judgment affirmed.

[ONONDAGA GENERAL TERM, JANUARY 8, 1860. Bacon, Allen Mullin and Morgan, Justices.]

JOSEPH TOWNER vs. LOUISA TOOLEY, adm'x &c., and others.

A testator, after making provision, in his will, for his wife, and giving legacies to eight of his children, ordered and directed that his son, R., should pay the legacies; and to reward him for doing so, the testator bequeathed to R. all his personal property not given to his wife, and all his freehold property in the town of M. subject to a life estate of the testator's wife in one third part of it. The residue of his real estate he gave to all his children equally.

Held 1. That the legacies were an equitable charge on the land devised to R. 2. That R. having accepted the devise, was personally liable for the legacies. 3. That the personal estate not only of the testator, but of R., must be first exhausted, before resort could be had to the real.

The executrix named in the will having renounced, R. became the administrator of the testator, with the will annexed. All of the personal property of the testator passed into his hands, and he converted the same to his own use and died insolvent, without having paid the legacies. In an action brought by a legatee, upon R.'s administration bond, to recover the amount of his legacy; *Held* that there was no necessity for an account by the defendants, so as to justify a resort to equity on that ground.

Held, also, that but a single suit was necessary, in order to enable all the legatees to recover their legacies, which suit should be in behalf of all who might choose to come in; that as the legacies were or might be a charge on the real estate, the owners of the land should be parties defendants; and that all the obligors in the administration bond given by R., or their representatives, should also be parties defendant. ALLEN, J. dissented.

APPEAL from an order of the special term, overruling a demurrer to the complaint.

The complaint contained three counts. The facts alleged in the complaint are stated in the opinion of the court. The administratrix of Fimbria Tooley, and George Thomson, administrator of Richard Tooley, two of the defendants, demurred to the whole complaint, and assigned seven grounds of demurrer: 1. That the surety of an administrator on his bond cannot be joined with the administrator or his representative, nor with the administrator of the original testator, in a suit to compel an accounting, but an accounting and a decree against the administrator, and an order to assign or prosecute, are conditions precedent to the maintenance of a suit against the parties on their bond. 2. That Louisa Tooley is improperly joined as a party defendant with the de-

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defendants Thomson and J. Tooley, as the complaint on its face shows that there are no assets remaining of J. Tooley, senior, and Richard Tooley died insolvent, and no property remains from which a judgment could be collected. 3. There is a defect of parties. All the legatees, and the husbands of such as are married women, should be made parties defendant. 4. The duty of paying the legacies was, by the will, imposed on Richard, the devisee and legatee, and not on the executor or other representatives of the executor, and hence Richard was not liable on his bond for any breach of duty as administrator, nor were his sureties ever liable on the bond. 5. The complaint is multifarious, and embraces causes of action which cannot be united, being partly legal and partly equitable. 6. The whole cause of action is barred by the statute of limitations. 7. An accounting and decree of the surrogate are conditions precedent to an action on the bond.

These grounds of demurrer present the questions discussed by the justice delivering the opinion.

P. Gridley, for the appellants.

O. S. Williams, for the respondent.

MULLIN, J. This action is brought to recover of the defendants, as administrators, the amount of two legacies bequeathed by Jeremiah Tooley, deceased, to his daughters Florilla and Hannah. The plaintiff is the husband of Florilla, and claims to recover her legacy, as owner, by virtue of his marital rights, and Hannah has assigned to him her right of action for her legacy. There are two counts in the complaint, one on each legacy. They are alike, except in the allegation relating to the right in which the plaintiff claims to recover. By the will of the testator provision is first made for his wife, then legacies are given to eight of his children, and lastly he orders and directs that his youngest son, Richard, pay or cause to be paid all and every of the above sums

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to each individual above named, in three equal annual payments, after his decease. And to reward Richard for making such payments, he bequeathed unto him all his personal property not given to his wife, and all his freehold property in the town of Marshall, subject to a life estate of his wife in one third part of it, and the residue of his real estate he gave to all his children equally. The widow was appointed executrix of the will. She declined to accept the trust, and the son Richard was appointed administrator with the will annexed, and gave a bond in the penalty of \$3000 on his appointment, with two sureties, with the condition therein that if he faithfully executed the trust and obeyed all orders of the surrogate of the county of Oneida, the same should become void. Enos Austin and Fimbria Tooley were the sureties in said bond.

Richard took possession of the personal property, after his appointment, and administered as aforesaid. In 1850 said Richard died, in the county of Oswego, leaving a widow, who afterwards married the defendant Thomson, and the latter in right of his wife was duly appointed administrator of the goods &c. of said Richard, by the surrogate of Oswego county.

Fimbria Tooley, one of the sureties, died in 1855, and in 1857 the defendant Louisa Tooley was duly appointed his administratrix, by the surrogate of Oneida county. Enos Austin, the other surety, died in 1843, and in 1845 there was a final settlement and accounting and distribution of his estate by and before the surrogate of Oneida. After the death of Richard Tooley, the defendant Jeremiah Tooley was appointed administrator of that part of the estate of Jeremiah left unadministered by said Richard.

It is charged in the complaint that Richard died insolvent. That nothing remains of the estate of Jeremiah, deceased, which the present administrator can reach, nor can he obtain any thing from the estate of said Richard, although he died largely indebted to the estate of said Jeremiah. Richard did not pay the said legacies, nor did he account before the surrogate as such administrator, by reason whereof the con-

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dition of said bond has been broken. The complaint prays for an accounting and settlement touching the estate of Jeremiah Tooley, deceased, and of the estate of Richard, deceased, and a judgment declaring the liability and indebtedness of said Richard as administrator, and of his estate and personal representatives, to pay said legacies, and that there be a judgment that the defendant Louisa, as administratrix of Fimbria Tooley, surety as aforesaid, pay said legacies. The defendants demur to the complaint, and to each count or cause of action, on seven distinct grounds.

One of the principal grounds of demurrer is that the duty of paying the legacies is imposed on Richard as devisee, not as administrator with the will annexed, and he was never liable as administrator, on his bond; especially when there were no assets in the hands of the administrator when suit was brought. That neither Richard nor the administrator of the surety is liable on the bond. If the defendants are right in this proposition it disposes of the case and renders further examination unnecessary.

In *Harris v. Fly*, (7 Paige, 421,) the testator gave to his son his farm in fee, subject to a life estate devised to his wife. He gave legacies of \$1000 each to his two daughters, to be paid them by his son, the devisee of the farm. The testator appointed his son and two others executors, and authorized them to dispose of so much of his personal property as was necessary to pay his debts, and expenses of administration. The will concludes as follows: "And finally, all the rest and residue of my estate and effects real and personal, not hereinbefore mentioned or otherwise effectually disposed of, after payment of all my debts, legacies and personal expenses and other charges and deductions as aforesaid, I give and devise unto my son Aaron." Aaron was the devisee of the farm. The chancellor says: "the testator does not in terms create an equitable charge upon the devised premises, for the payment of the two legacies to the daughters. But that was not necessary, as the charge of a legacy upon the real estate

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of the testator, either in aid of or in exoneration of the personalty, may be and frequently is created by implication merely. The personal estate is the primary fund for the payment of debts and legacies. * * * But when the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate, unless there is something in the will itself to indicate a contrary intention on the part of the testator." In *Dodge v. Manning* (11 Paige, 334) the chancellor held, under a will similar to the preceding one, as he held in 7th Paige, that the legacies were an equitable charge on the land, and also that in such case when the devisee accepts the estate devised to him, he is personally liable. (See also *McLachlan v. McLachlan*, 9 Paige, 534; *Dodge v. Manning*, 1 Comst. 298; 1 Paige, 407.)

It was held in *Hoes v. Van Hoesen*, (1 Comst. 120,) that the general rule is that the personal estate of a testator is the primary fund for the payment of legacies, and a testator is presumed to act upon this legal doctrine, unless a contrary intent is distinctly manifested by the terms and provisions of the will; and that when the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies, notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisee in such case will be deemed in aid and not in exoneration of the primary fund.

These cases establish three propositions applicable to the case in hand: 1st. That the legacies for which the action is brought are an equitable charge on the land devised to Richard; 2d. That Richard having accepted the devise, was personally liable for the said legacies; and 3d. That the personal estate must be first exhausted before resort is had to the real.

The personal estate referred to in the last proposition is not

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only that of the testator, but of the devisee upon whom or whose land the legacies are charged by the will. (*McLachlan v. McLachlan*, 9 Paige, 534.)

The plaintiff in this suit does not seek to charge the real estate with the legacies for which he sues, as he might have done, and thus settled the whole question in a single action.

While the personal estate is primarily liable, if the legatee is compelled to resort to a court of equity, it is not only proper but necessary that the bill be so framed that complete justice may be done, and the rights and liabilities of all the parties finally settled in a single suit if it is practicable to do so.

In *Dodge v. Manning*, (1 Comst. 289,) the devisee who was charged with the payment of the legacies, and the purchasers of the real estate on a sale under a mortgage given by the devisee, after the death of the testator, on the land equitably chargeable with the payment of the legacies, were parties defendant, and the court of appeals ordered judgment against them, charging the lands purchased by them with the payment of the legacies and costs, so far as there might be a deficiency after the remedy against the devisee was exhausted.

Although the defendant is right in his position that the land devised to Richard Tooley is, in equity, chargeable with the payment of the legacies, yet it is not true that the remedy of the plaintiff is confined to the land. The personal estate bequeathed to him, and his own personal estate, are primarily liable, and must be exhausted before resort can be had to the real. (*McLachlan v. McLachlan*, 9 Paige, 538.)

It was competent for the plaintiff to have united the purchasers of the real estate as parties defendants, but he was not obliged to do so. Whether he can hereafter resort to the owners of the land, is not necessary now to inquire. It is enough that he is right in attempting to reach in the first instance the personal estate. The personal estate of Jeremiah Tooley, the testator, is first liable. That property, it

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is alleged in the complaint, all passed to Richard, who afterwards became administrator with the will annexed, and it was sufficient in amount to pay the debts and legacies as alleged in the complaint. But it is further alleged that there is none of that personal estate to be found; that Richard converted it to his own use and then died insolvent. This being so, what necessity is there for an account? The total want of assets must relieve the administrators of both the estates of Jeremiah and Richard from the expense and trouble of a useless litigation. In *Hoes v. Van Hoesen*, (1 *Conn.* 120,) there was a reversionary interest in personal estate, which the court held must be resorted to and exhausted before the real estate could be charged; and a reference was insisted upon to take an account to ascertain whether the debts and legacies would exhaust it. But Judge Jewett, declaring the opinion of the court, says: "If the case was such that it could not be seen without a reference that they would exhaust it, an account in the event mentioned should be taken. But there is no room for any doubt on that question." And after showing that the legacies were more than sufficient to exhaust the personal, he adds: "There is not the least ground appearing in the case rendering it proper or necessary for such reference."

In *Dodge v. Manning*, (*cited supra*,) the chancellor, after holding that the personal must be exhausted before resort to the real, says: "As it appears from the inventory that the testator left personal estate sufficient to pay the legacy, the complainant was bound to show that this personal estate was exhausted in the payment of debts of the testator, or that those who were accountable for it were irresponsible, before she (the legatee) could resort to the real estate in the hands of those claiming under the mortgage executed by the devisee."

It is shown in this case, by the complaint, that the personal estate of Jeremiah Tooley is consumed, and that the party liable for it is insolvent, and thus a case is made which would justify a resort to the real estate. So far then as an

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accounting is relied upon as furnishing a ground for resort to equity, it seems to me the complaint itself admits it away. But it may be said that the bond stands in the place of the personal, and that within the cases cited the plaintiff must exhaust his remedy against the parties to the bond, and that this action is properly brought to recover against those parties. The defendants' counsel insists, however, that Richard Tooley received the property as devisee and legatee and not as administrator, and that the bond is therefore void. The will makes no provision for the payment of either debts or funeral expenses, and hence the appointment of an administrator (the executrix remaining) became necessary, and under the statute the administrator could not be appointed unless he gave a bond. We must assume, I think, that Richard received the property as administrator, and that his bond was a valid and operative instrument, at the time of its delivery to the surrogate.

The case then stands thus: the bond is valid; the principal is dead and his estate insolvent. Both of the executors are dead; the estate of one is distributed, and neither administrators nor next of kin are made parties; the administrators of the insolvent principal and of the other surety are before us. Under these circumstances, can this action be maintained without bringing in other parties? In *Story's Eq. Pl.* 138, it is said if the obligee of a bond to which there are other parties, the principal obligor being dead, were to seek by bill in equity the full payment of the bond from the sureties, all the sureties must be joined. But if he should seek only for his proportion, from one surety alone, the same objection might not apply unless the absence of the other parties might be a prejudice to him. In *Bland v. Winter*, (1 *Sim. & Stu.* 247,) it was held that to a bill filed by an obligee of a joint and several bond, for payment of his debts, all the obligees must be made parties. The action, in that case, was brought against the executor and grantee of the surety only, to set aside the conveyance of certain

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lands to him as fraudulent. The assets being insufficient, objection was made that the principal was not joined, and the case was disposed of as above stated. In *Cockburn v. Thompson*, (16 *Vesey*, 326,) it was said by the lord chancellor that the plaintiff, suing upon a joint and several bond, must bring forward all the obligors, principals and sureties, but the rule is dispensed with when it appears that the sureties are insolvent. (*Cuddeback v. Kent*, 5 *Paige*, 92.)

It was held in *Valentine v. Farrington*, (2 *Ed. Ch. R.* 53,) that when the bond is joint and several it is only necessary to make the surviving obligor a party; citing *Haywood v. Ovey*, (16 *Mad. Ch. Rep.* 113,) *Bland v. Winter*, (cited *supra*,) and *Edwards on Parties*, 99-102. The last two authorities do not sustain the position of the learned vice chancellor. On the contrary, the case of *Bland v. Winter* is directly against him, and the cases cited in *Edwards on Parties* are quite clearly against him.

There is an obvious propriety in requiring all the obligors in a bond to be brought in who are able to respond to the plaintiff. It avoids circuity of action, and enables the court to settle the rights, not only of the plaintiff and defendants, but of the defendants among themselves. It seems to me, therefore, that those parties who represent the other surety, or who are liable to contribute toward his share of the debt, are necessary parties in this suit. To avoid misapprehension, I repeat that upon the allegations of the complaint, I consider the estate of Jeremiah and Richard Tooley, and their administrators, to be out of the case, both being insolvent, and that this must be deemed to be an action in equity to enforce the bond against the obligors therein. Being so treated, I am of the opinion that those representatives or persons taking the estate of the co-obligor, Austin, are necessary parties to the suit.

It is insisted by the defendants' counsel that all the legatees named in the will should be parties plaintiff, or that the complaint should be filed on behalf of the plaintiff and all

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other legatees who may choose to come in. The personal estate being the primary fund for the payment of debts and legacies, and as the bond is all that remains to pay these charges, the legatees can only demand such portion of the amount due on the bond as shall remain after paying the debts. It follows that if one of the creditors or legatees may sue alone for his debt or legacy, the obligor may be compelled to pay much more than the penalty of the bond, and be ruined in the litigation, by the vast number of suits to which he might thus be subjected. To avoid these results, the court of chancery has required either that all those interested in the fund should join, or that one suit should be brought for the benefit of all. (*Edwards on Parties*, 136, 137. *Brown v. Ricketts*, 3 *John. Ch.* 555. *Pritchard v. Hicks*, 1 *Paige*, 273.)

The general rule is that one legatee may sue alone for his legacy. But when the assets are not sufficient to pay all, then all interested in the fund should be made parties, or the suit prosecuted for their benefit, (*Story's Eq. Pl.* 107-109;) or if the legatees prosecute severally, the court will permit but one to be prosecuted, and allow all to come in under the decree. (1 *Paige*, 416.) And when the object of the suit is to charge the legacies on the real estate, all the legatees must be parties. (*Hallett v. Hallett*, 2 *Paige*, 15.)

For the reasons suggested, I am of the opinion the demurrer is well taken. Without assuming to decide what the form of action in this case should be, or who should be parties, it may be proper to state the conclusions to which we have arrived in the examination of the case. They are:

1. That but a single suit is necessary in order to enable all entitled to shares of the fund to recover such shares, which should be in behalf of all who may see fit to come in.
2. That as the legacies are or may be a charge on the real estate, the owners of it should be parties defendant, so that a decree may pass against them, in case of the personal being insufficient to pay all the legacies.
3. All the obli-

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gors in the bond, or their representatives, should be parties defendant. Without examining the other grounds of demurrer, we are of the opinion that the order overruling the demurrer must be reversed.

MORGAN, J. concurred.

ALLEN, J. dissented.

Order reversed.

[ONONDAGA GENERAL TERM, July 2, 1860. *Allen, Mullin and Morgan* Justices.]

HICKOX vs. TALLMAN and WILLIAMS.

There can be no vested right in a mere rule of evidence. Nor has the grantee in a deed from the comptroller, of land sold for taxes, while the act of 1850 (*chap. 188*) was in force, any vested right to the benefit of the presumptions in respect to the regularity of the sale and of all the proceedings prior thereto authorized by that statute to be drawn in his favor.

Accordingly *held* that it was competent for the legislature, by the act of 1855, (*Laws of 1855, chap. 427,*) to repeal the act of 1850, and thus provide that deeds executed by the comptroller while the latter act was in force should not be thereafter presumptive evidence of the regularity of the proceedings.

Held also, that that result had been attained, by the act of 1855, and that there is now no statute relieving grantees of the comptroller under deeds executed prior to 1855, from making proof of every fact necessary to give the comptroller jurisdiction to execute the conveyance.

It is competent for the legislature to change the burthen of proof, in a given case, from one party, and cast it upon another; no rule of evidence at common law being changed.

THIS was an appeal from a judgment entered on the report of a referee.

The action was on a covenant of warranty and for quiet enjoyment, contained in a deed given by the defendants to the plaintiff, bearing date December 1, 1849. The eviction com-

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plained of was under a comptroller's deed, given pursuant to the statute, on a sale of a portion of the premises conveyed to the plaintiff as aforesaid, for unpaid taxes, to one Olcott, bearing date the 22d February, 1851. Olcott conveyed to one Steele, who entered and took possession of the portion of the premises sold by the comptroller. The sale by the comptroller was in 1848, and was for taxes for the years 1840, 1841, 1842, 1843 and 1844.

On the trial the plaintiff proved the deed from the defendants to him, the deed from the comptroller to Olcott, reciting his proceedings to sell the land therein described, for unpaid taxes, and his sale of said lands, the conveyance from Olcott to Steele, and the consideration paid by the plaintiff to the defendants for said land. He also attempted to prove the proceedings of the assessors and supervisor in assessing and levying said taxes, and of the collectors in returning the warrants issued for the collection thereof. But he failed to prove the regularity of such proceedings. The referee held the comptroller's deed no evidence of the regularity of the proceedings of the town and county officers in assessing &c. said taxes, and ordered judgment for the defendants.

J. Noxon, for the appellant.

Mr. Hiscock, for the respondents.

By the Court, MULLIN, J. The deed under which the plaintiff claims title is dated 1st December, 1849, and was recorded the 22d March, 1855. The deed under which the person claiming title to the portion of the land described in the plaintiff's deed, and from which the plaintiff claims to have been ousted, is dated 22d February, 1851, from the comptroller to Olcott; on a sale for unpaid taxes. The plaintiff insisted, before the referee, that the deed from the comptroller was *prima facie* evidence that the comptroller had power to sell, and of the regularity of the sale. The referee held and decided that the deed was not presumptive evidence

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that the sale, and all proceedings prior thereto, were regular. This is the principal question presented by the appeal, and if the ruling of the referee was erroneous a new trial must be granted.

Section 81, chapter 13, title 3, article 3, of the first part of the revised statutes as amended by chapter 183 of the laws of 1850, reads as follows: "Such conveyance (the comptroller's deed pursuant to a sale for unpaid taxes) shall be executed by the comptroller, &c., and every conveyance of land sold for taxes heretofore or hereafter executed by the comptroller, either in his own name or in the name of the people of this state, shall be presumptive evidence that the comptroller had authority to sell and convey the land described in it for arrears of taxes charged thereon, and that all proceedings, things and notices required by law to be had, done or given prior to the execution of such conveyance by the comptroller, have been had and done as required by law, but such presumption may be rebutted by legal evidence." It is quite clear that if this statute was in force the deed would be presumptive evidence of the regularity, not only of the sale but of all proceedings prior thereto, which the law required to be had in order to authorize a sale. But section 92 of chapter 427 of the laws of 1855 repeals chapter 183 of the laws of 1850, and enacts as follows: "§ 65. Such conveyance shall be executed by the comptroller, &c., and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redém, were regular according to the provisions of this act, and all laws requiring or directing the same or in any manner relating thereto."

It will be observed that this section does not apply to conveyances executed before its passage; and as the deed in question in this case was executed before the passage of that

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section, it is not within its provisions, and it is not necessary therefore to inquire whether it is made evidence for any purpose, under that statute.

The law of 1850 being repealed, there is either no provision of law in force declaring the effect of a comptroller's deed as evidence, or the provisions of the revised statutes are revived, or the act of 1850 must be considered in force as to all comptrollers' deeds executed prior to 1855; because, as it is contended, the legislature could not take away from parties deriving title under such deeds the benefit of laws then in force giving them effect as evidence; that the right to have the deed *prima facie* evidence of the regularity of the proceedings was vested, and could not be taken away by a repeal of the law. If the act of 1855 had simply repealed the act of 1850, there would be some reason for holding that the provisions of the revised statutes declaring the effect of the comptroller's deed as evidence were revived; but the act of 1855 not only repeals the act of 1850, but it makes provision as to the effect of such deeds thereafter executed as evidence. Under these circumstances it seems to me that we must hold that there is now no statutory provision in relation to deeds executed prior to the passage of the act of 1855; unless the repealing clause is void so far as it affects deeds executed prior to its passage.

If the act of 1855 had merely enacted the provision contained in § 95 of that statute, the statute of 1850 would have been repealed by implication, and being thus repealed, deeds executed prior to 1855 would have been left to be regulated by the act of 1850; but the latter statute and all laws inconsistent with the provisions of the act of 1855 are expressly repealed. (*See Laws of 1855, ch. 427, § 92.*)

If it was competent for the legislature to repeal the act of 1850, so that deeds executed while it was in force should not be thereafter presumptive evidence, it seems to me that result has been attained, and there is now no statute relieving the grantees of the comptroller from making proof of every fact

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necessary to give him jurisdiction to execute such a conveyance. The act of 1850, above cited, merely relieves the grantees of land sold for taxes from proving certain facts, which by law he would be bound to prove, had the statute not been passed, and it casts the burthen of disproving the facts presumed, upon the party not before bound to make such proof. The statute of 1855 which repeals the act of 1850, does not impair or lessen the effect of the deed from the comptroller as evidence of the matters contained in it. Its force as common law evidence remains the same after as before the statute. The presumptions which the statute of 1850 authorized to be drawn from the deed are swept away, and this is the only effect of the act. The question then comes to this: Is it competent for the legislature to change the burthen of proof in a given case from one party and cast it upon another, no rule of evidence at common law being changed? It seems to me that it is. The only limitation on the power of the legislature in cases of this kind is, that it shall not destroy or impair vested rights. Can it be said that the grantee of the comptroller, under a grant executed while the act of 1850 was in force, has a vested right to the presumptions which that act required to be drawn in his favor, as to the regularity of the proceedings on which it rested? It seems to me not. It was a great hardship to compel a purchaser of lands, sold for taxes, to prove the regularity of all proceedings required by law in the levying and collection of the tax prior to the execution of the deed. A title acquired, resting on such proceedings, would be almost valueless; and no person would be likely to purchase at a comptroller's sale who did not desire to spend the remainder of his days in litigation. It was an act of duty, as well to purchasers as to the state, to relieve purchasers from the trouble and expense of proving the proceedings to levy and collect the tax. And it may be conceded that it is unjust to repeal such a law, and thereby in many cases render totally worthless the title which the state professed to pass by the deed. But the question is

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one of power, not of policy. If, under a statute similar to that of 1850, rights became vested so as to preclude the right to repeal, it is difficult to imagine a statute under which rights will not become vested, and thus an end be put to the repeal of statutes. If a statute forbids an act and gives a penalty for its violation to an individual or corporation, it would seem that a right to the penalty had become vested; especially so after an action had been brought for its recovery, and expenses incurred. Yet it is well settled that it is competent for the legislature to repeal the law, and all rights under it will be taken away. (*Smith on Statutes*, 892 *et seq.* *Butler v. Palmer*, 1 *Hill*, 330, and cases cited.) So of a statute which takes away a right of appeal. (*Grover v. Coon*, 1 *Comst.* 536.) So also where a statute shortens the time for redemption. (*Butler v. Palmer*, 1 *Hill*, 330.) In the case last cited, Justice Cowen says: "I know that rights of action and other executory rights arising under a statute are said to be vested * * *; they are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract, within the meaning of the constitution. But that being out of the way, and the statute being simply repealed, the very stock on which they were grafted is cut down, and there is no rule of construction under which they can be saved."

There is no shadow of ground for holding the grantee in a deed from the comptroller, of land sold for taxes, after the passage of the act of 1850, to have a vested right to the benefit of the presumptions provided for by that statute. The clause of the statute under consideration was remedial merely, and there is no reason why such statutes may not be repealed by the legislature. I will not say no case can arise in which rights will vest under such statutes, thus precluding an appeal; but the cases must be very rare indeed, and I am quite clear that this is not one of them. The case of *Jackson v. How* (19 *John.* 80) has been cited to us, and is the only case which the counsel for the plaintiff has been able to find giv-

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ing color to the proposition he is bound to maintain in order to support his action. In that case the plaintiff offered in evidence a patent from the state to Col. Lewis Atayaghrongton, for the premises in question, dated 29th January, 1792; also an exemplification of the record of a deed from the patentee to one Van Slyck, dated April 21, 1792, which had been duly acknowledged on the 14th of May, 1792, and recorded in Cayuga county, January 22, 1814. This exemplification was objected to by the defendants' counsel. The plaintiff then produced the original deed, taken from the files of Cayuga county, which was proved to have been duly deposited in the office of the secretary of state, with certificate of acknowledgment and a certificate of its being recorded in the office of the secretary of state. This was also objected to. By the 7th section of an act of 12th of April, 1813, it was provided that every conveyance acknowledged prior to the 6th of April, 1801, agreeably to any act in force at the time of such acknowledgment, and not recorded, should be entitled to be recorded, and that every deed so acknowledged, whether recorded or not, or the record thereof or a transcript of such record, might be read in evidence. By an act of the 4th of February, 1814, no deed relating to the title of lands granted as bounty lands to officers, &c. who served in the army of the United States, executed before the 1st of May, 1797, should be thereafter registered or recorded, unless acknowledged according to the provisions of the 1st section of the act of the 12th of April, 1813, any thing in section 7 of that act to the contrary notwithstanding. An act of the 14th of April, 1820, declared that unless a deed was acknowledged according to the 1st section of the act of the 12th of April, 1813, it should not be read in evidence. The deed to Van Slyck had been acknowledged in accordance with the law in force at the time of its acknowledgment, and by the very terms of the act of 1813 the deed, the record thereof, and a transcript of its record, were evidence of the contents of such deed. The acts of 1814 and 1820 did not in terms repeal the act of 1813,

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nor did those acts in terms apply to deeds acknowledged before the passage of the act of 1814. The question there was whether the court would allow the acts of 1814 and 1820 to have a retrospective effect, and take away from parties rights acquired under the previous statutes, or whether they would construe its provisions as prospective merely, and thus avoid the mischief which must have resulted from the other construction. The court very wisely held, in accordance with the well settled rules of construction of statutes, that the acts of 1814 and 1820 must be held to be prospective, and as not affecting deeds acknowledged and recorded prior to their passage. That case is not at all like this; nor is there any principle decided in it affecting the case in hand. Were it not that the act of 1850 was repealed by the act of 1855, the latter act would by its terms operate prospectively only; but when it repeals the act of 1850 it closes the door against construction, and leaves to the courts no other duty than to yield to its provisions.

It is suggested by the learned justice delivering the opinion in *Jackson v. How*, whether it was competent to the legislature to enact that public records should not be admitted as evidence of the transactions regularly and legally recorded; that as to purchasers the record is part of the title, and an act which would declare the record inadmissible in evidence would obliterate their title, would impair not only a vested right, but would impair and destroy the foundation of the contract between the parties. I should hesitate a long time before I would admit the power in the legislature to declare that a record of judgment or of a deed duly acknowledged and recorded should not be evidence. But whether or not it should be held within the power of the legislature to so legislate, it does not reach this case. The repeal of the act of 1850 does not impair the force of the deed as evidence of the contract between the parties. That is left to speak for itself, as perfectly as if that act had never been passed. The presumptions which that act declared should thereafter be drawn

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from the deed, when proved, are swept away. There can be no vested right in a mere rule of evidence.

For these reasons I think the referee was right in holding the deed not evidence of the regularity of the proceedings to levy or collect the tax. It cannot be claimed that if the deed is not evidence of the proceedings referred to, there is any legal proof of them before the court.

It will be exceedingly burdensome to parties to be compelled to make proof of the proceedings required by law in levying and collecting taxes, in order to give validity to a comptroller's deed; but it was for the legislature to leave purchasers at tax sales subject to this legal obligation, however onerous or unjust it may prove to be. I think such parties are thus left, and they must look to the legislature, and not to the courts, for relief.

The judgment of the referee must be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, October 2, 1860. *Allen, Mullin and Morgan*, Justices.]

STRONG vs. WHEATON and others.

Stockholders in a manufacturing corporation are not bound by the acts or declarations of the foreman of the company; he not being in any respect their agent.

A judgment recovered against a manufacturing corporation, by an employee, is not even *prima facie* evidence of the amount which the plaintiff therein is entitled to recover in a subsequent action brought by him against stockholders, for work and labor.

To entitle the plaintiff to recover in such an action he is bound to prove not only the existence of the corporation, the recovery of a judgment against it, the issuing and return of an execution unsatisfied in whole or in part, but the performance of labor to some amount, and that the defendants were stockholders.

Persons signing the articles of association of a manufacturing company are stockholders; and when the holding of stock is once established it must be presumed to continue, until its surrender or assignment is shown.

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The word "obligation," as used in section 120 of the code, which declares that persons severally liable on the same *obligation* or instrument, &c., may all or any of them be included in the same action at the option of the plaintiff, should be confined to its legal meaning. It does not embrace a class of actions not evidenced by a writing.

Accordingly *held* that an action for work and labor could not be maintained against two stockholders of a corporation, by an employee of the company, without bringing in the other stockholders.

APPEAL from a judgment rendered at the circuit. The cause was tried before the court without a jury. The action was brought against the defendant to recover for work and labor done by the plaintiff and his servants for the American Printing Press Company, a corporation duly organized under the general law of 1848, regulating the incorporation of manufacturing companies, and located at Oneida depot in Madison county. The defendants were stockholders in said company. On the trial the plaintiff gave evidence as to the length of time he was in the employ of the company, but it was very loose and indefinite. He also proved that there was a settlement with some of the foremen of the company after the dissolution of the corporation. The recovery of a judgment against the company and the issuing of an execution thereon, and its return unsatisfied, were also proved. The court treated the judgment against the company as *prima facie* evidence of the amount due to the plaintiff; and this presents the principal question discussed on the appeal and by the justice delivering the opinion of the general term.

Sheldon & Brown, for the appellants.

Gray & Bates, for the respondent.

By the Court, MULLIN, J. To entitle the plaintiff to recover he was bound to prove, not only the existence of the corporation, the recovery of a judgment against it, the issuing and return of an execution unsatisfied in whole or in

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part, but the performance of labor to some amount, and that the defendants were stockholders.

It is insisted by the appellants' counsel that there is no legal proof of service rendered to an amount equal to the sum recovered. The plaintiff himself was called, and testified that he commenced work for the corporation in December, 1856, and worked to the last of February, 1857, at twelve shillings per day. He does not inform us on what day or in what part of the month of December he commenced, nor the day on which his service ended. On his re-direct examination he says: "we received no money in December, January or February; we asked for some in each of these months." Being employed by the day, he was entitled to recover only for the amount of days he actually worked, and it is quite clear that he did not work all the time. To obviate the difficulty of not having proved the precise number of days' labor, the plaintiff gave evidence of a settlement with the foreman and a balance struck, in March, after the corporation had ceased business. This evidence was objected to, but the objection was overruled, and the evidence received. If the corporation had ceased business it is difficult to understand how the foreman could bind the company, much less the stockholders, by any act or declaration of his own.

I am quite clear that on the evidence the corporation was not bound by the settlement. But if I am mistaken in that, there can be no pretense whatever for holding the individual stockholders bound by the act or declaration of the foreman. He was in no respect their agent.

The judgment recovered against the corporation is no evidence of the amount which the plaintiff is entitled to recover, as against the stockholders. It is essential to a right of action against the stockholders that a judgment should have been recovered, but it is proof of nothing beyond the fact of its own existence. (*Moss v. McCulloch*, 5 *Hill*, 131. In *Same v. Same*, (7 *Barb.* 279,) the general term in the 4th district held a judgment against the corporation *prima facie* evi-

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dence, in an action against the stockholders; thus directly overruling the case in the 5th Hill. The latter case is overruled on the grounds that the case of *Slee v. Bloom*, (20 John. 669,) in the court of errors, was decisive of the question, and the court was not at liberty to follow the case in the 5th Hill. Justice Cowen, in his opinion in the latter case, reviews the opinion of Chief Justice Spencer in *Slee v. Bloom*, and comes to the conclusion that he did not intend to depart from the law as laid down by the chancellor on the point under consideration, and as the judgment of the court of errors could be sustained upon other grounds, he concluded that *Slee v. Bloom* was not decisive. And the other judges seem to have concurred with him, and to have adopted, after mature consideration, the rule as I have stated it. With all respect for the court which felt itself at liberty to overrule the decision in 5th Hill, it seems to me that Justice Cowen was right in holding the decision of the court of errors not binding on this question.

When that case was before the chancellor, (5 John. Ch. 366,) it was shown that the indebtedness to the plaintiff from the corporation was for real and personal estate sold by Slee to A., for part of which he accepted stock in payment and a bond of the company for the residue. About the time the corporation ceased business the trustees and Slee had a settlement of their respective claims, and the balance due on the bond was ascertained. After this, Slee brought his action to recover such balance, against the company, and recovered. The bill was then filed against the stockholders, under the statute, to compel contributions to pay the plaintiff's debt. The bill was dismissed by the chancellor on grounds not necessary to be considered here. The decree was reversed, and the case remitted to chancery to give effect to the judgment. In the decree entered in chancery there was an order of reference to ascertain and report the debt due to Slee, and the parties were permitted to use the pleadings and proofs, and to give such further competent proof as either

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party might see fit to furnish. The master made a special report, in which he stated there were questions raised before him which it was important to the parties to have decided before he proceeded further in the investigation of the accounts; that in order to establish the debt against the corporation, a copy of the judgment in favor of Slee against it had been produced, and describes the judgment. He then proceeds to say that from the proved and admitted facts in the case the corporation did make, execute and deliver the bond described in the judgment record, and that it was given for a balance of account due to him as finally adjusted by the trustees. The plaintiff's counsel also exhibited to the master a statement of his account against the corporation, and insisted the balance appearing due should be considered as the amount due to him. The defendants' counsel insisted that the account, bond and judgment were not conclusive, but that they were at liberty to contest the same. The master further reported that neither the decree nor remittitur expressly directed that the bond and liquidation should be conclusive, nor that the consideration might be inquired into, but left the question whether they were to be treated as conclusive as *prima facie* evidence of the debt, to be ascertained according to the principles of equity. The plaintiff's counsel excepted to the foregoing branch of the report. The chancellor, in disposing of this exception, says the judgment against the company in its corporate character is not binding and conclusive upon the defendants when charged in their private and individual characters, and as by the pleadings sufficient grounds had been laid for opening the account, he authorized the defendants to go into evidence on that subject. From this order there was no appeal to the court of errors, and the foregoing branch of it, as to the effect of the judgment, was affirmed. It will be seen from this abstract of the proceedings that the question whether a judgment against the corporation was conclusive against the stockholders was the only question decided by the chancellor, and hence the only

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one presented to the court of errors. Whether or not it was *prima facie* evidence could not be before the chancellor, because the defendants yielded to it as *prima facie* before the master, and merely claimed that they should be permitted to go behind it and assail the consideration. What the chief justice may have said as to the effect of the judgment is not very important. If the judgment was not conclusive, the question as to what other weight it might be entitled to as evidence was not before the court, and the remarks of the judge, while entitled to the highest respect, are not binding as authority.

It seems to me, therefore, that the supreme court was at full liberty to decide the question in the 5th Hill, entirely relieved from the case of *Slee v. Bloom*, as a binding authority; and having held that the judgment was not even *prima facie* evidence, I am disposed to follow it, until the court of last resort shall declare it erroneous. I am the more willing to follow this course, because the court of appeals in a recent case (the title of which I am unable to give) refused to adopt the supposed doctrine of the case of *Slee v. Bloom*, which it seems to me they should have done, if that case is authority on this question.

If we are to examine the question as to whether a judgment against a corporation is *prima facie* evidence against a stockholder, I apprehend it would be found very difficult to support the proposition. If the stockholders are sureties, then they are never bound by a judgment against the principal, unless they have so expressly agreed. If they are to be deemed partners, and liable as such, a judgment against a third party is no more evidence against a partner than against another individual; and although a judgment against one joint debtor is evidence of the amount to be recovered, in a subsequent action against another joint debtor, yet there is neither partnership nor joint liability between the corporation and the stockholder.

If the judgment is not evidence, by reason of the existence

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of one or other of these relations between the parties, I know of no other relation or position upon which it can be treated as evidence for any purpose. So far as the corporation can be considered the agent of the stockholders, so far is he responsible for its acts. But there is no such relation in the confession of a judgment by the corporation, and surely there can be none where it is recovered adversely.

I am of the opinion that there is no legal proof of an indebtedness to the amount of the judgment.

The names of both defendants are signed to the articles of association. By the 2d section of the general law providing for the incorporation of manufacturing companies, passed in 1848, those signing such articles, and their successors, are declared to be a body corporate. Those who sign these articles must therefore be stockholders, and when the holding of stock is once established it must be presumed to continue, until its surrender or assignment is shown.

I do not see how the question as to the parol admissions of the defendants is of any importance in the case. The holding of stock is abundantly proved without them.

The defendants' counsel insists that as by the 18th section of the general law stockholders are jointly and severally individually liable for debts due by the corporation to its employees, and as it appears by the evidence that there are several stockholders besides the defendants, this action should have been brought against all or only one of such stockholders, and cannot be maintained against two only. Under the former system of pleading, when the action was upon a joint contract, all of the parties liable upon it must be joined, and if not joined the omission could only be taken advantage of by plea in abatement. But if it appeared on the face of the declaration or other pleading of the plaintiff that the party omitted was still living, the defendant might demur, move in arrest of judgment or sustain a writ of error. (1 *Chit. Plead.* 29.) When the contract was several as well as joint, the plaintiff might proceed against all or one only of the contract-

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ing parties. When there were three who were jointly and severally bound, if two only were sued, the objection must be taken by plea in abatement, and was not ground of nonsuit. (*Idem*, p. 80.)

A plea in abatement is not admissible under our present practice, and hence defects of parties must be taken advantage of by demurrer, when it appears on the face of the complaint, (*Code*, § 144;) and when the defect does not so appear, by answer. (*Same*, § 147.) The non-joinder in this case appears on the face of the complaint, but it does not appear by it that the person omitted is living, and hence a demurrer would not lie. The answer sets up the non-joinder of one Northrup as a defendant, and it was conceded that he was a stockholder and living. If the common law rule as to the joinder of parties is still in force, the action must fail by reason of the defect thus established. It is said that the rule at common law has been changed by § 120 of the code, which declares that persons severally liable on the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff. In *Brainard v. Jones* (11 *How.* 569) it was held that all or any of the persons severally liable on a bond may be joined in the same action, and that § 120 did not apply to parties to bills and notes only. The terms of the section apply to obligations and instruments on which the parties are severally liable. In *Brainard v. Jones* the bond sued on was joint and several. The case then applies to and governs this, if the subject matter of the action is an obligation or instrument.

By the use of both terms, it would be fair to presume that the legislature did not intend to cover the same identical cases. The word "instrument" includes every species of writing except obligations. The word obligation must therefore have been intended to embrace those securities known in the law as bonds only, as then both terms mean the same thing. The word "*obligation*" had a well known meaning

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in the law, and we must presume the legislature knew what it was, and used it in that sense. *Jacob*, in his Law Dictionary, defines the word "*obligation*" as a bond containing a penalty with a condition annexed for the payment of money, performance of covenants or the like. Obligations may also be by matter of record, as statutes and recognizances.

The word "*obligation*" is from the Latin word "*obligatio*," which *Justinian* defines to be a bond of law by which we are necessarily bound to pay something according to the laws of our country. *Bracton* defines it to be a bond of law by which we are necessarily bound to give or do something. *Burrill*, in his Law Dictionary, defines the word obligation as follows: "Binding force or efficacy; binding force in law; a binding or state of being bound in law; a duty imposed by law, for the fulfillment of which one party is bound to another. An instrument in writing by which a party is bound in law or bond, commonly called a writing obligation." *Lord Coke* says that an obligation is a word of large extent, but is commonly taken, in the common law, for a bond containing a penalty with a condition for payment of money, or to do or suffer some act or thing.

Webster defines obligation to be, 1st. The binding power of a law, promise, oath, or contract, or of law, civil, political or moral, independent of a promise; that which constitutes legal or moral duty, and which renders a person liable to coercion and punishment for neglecting it. 2d. The binding force of civility, kindness or gratitude, when the performance of a duty cannot be enforced by law. 3d. Any act by which a person becomes bound to or for another or to forbear something. 4th. In law, a bond with a condition annexed and a penalty for non-fulfillment.

It will be seen that all these definitions agree that the word obligation, when taken in its legal sense, means a bond or other writing in the nature of a bond, such as statutes merchant and staple, recognizances, &c. If we take the word in its popular signification, as an act by which a person becomes

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bound to, or for, another, or to perform something, it will embrace every conceivable liability, written or unwritten, by which one man may be bound to another, and in regard to which there may be a several liability. To give it this extensive signification would produce serious mischief and disorder in the administration of the law. This manufacturing law presents a very apt illustration of the consequences which would result from giving to the word the popular signification alluded to. By § 32, all the stockholders in these companies are severally individually liable to the creditors of the company, to an amount equal to the stock held by them, for all contracts and debts made by such company, until the whole capital is paid in and certificates filed. The court of appeals, in *Corning v. McCullough*, (1 Comst. 47,) held that the liabilities of stockholders for the debts of a corporation, under a statute similar to the one under consideration, was not created by statute, but was an original and primary obligation against them as partners. If the liability is that of partners, then it arises against all at the same time, but by the statute each stockholder is only liable to the amount of the stock. If then three persons, stockholders, one of whom owns \$500 of stock, another \$2000, and another \$3000, in one of these corporations, are sued for a debt of the company for \$1000, judgment must pass against each for a distinct amount, and execution must follow the judgment. Such judgments are admissible in an equity court, but never in a court of law, in a common law action, unless this statute presents such an absurdity. Other cases might be supposed in which the same or similar results would follow the joinder of a part only of those who at common law are liable, or the joining of several, when from the very nature of the case but a single judgment can be rendered. I admit that in an action, under the 18th section of the general manufacturing law (under which this action is brought) all the stockholders are liable to the employees for their wages, without reference to the amount of stock held by them, and in such case a judg-

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ment may be entered against all the stockholders for the same amount, and the difficulty I have suggested would be avoided. Yet that does not lessen the force of the argument. The statute should not receive a construction which is to introduce confusion into the practice of the courts, unless the language of the statute is so peremptory and the intent so plain that it cannot be avoided.

It seems to me, therefore, that the word obligation must be confined to its legal meaning, and that it does not embrace a cause of action not evidenced by a writing; that the cause of action in this case is not reached by section 120 of the code; and that the action cannot be maintained without bringing in the other defendant.

The judgment ought to be reversed, and a new trial ordered; costs to abide the event.

Ordered accordingly.

[ONONDAGA GENERAL TERM, July 2, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

BUMPUS vs. MAYNARD, Sheriff, &c.

The necessary wearing apparel of every debtor is exempt from levy and sale on execution.

THIS action was brought in a justice's court, against the defendant, sheriff of Onondaga county, for not collecting an execution delivered to one of his deputies, issued on a judgment recovered by the plaintiff against one Losee, as he might and ought to have done. It was proved on the trial that a judgment had been recovered by the plaintiff against said Losee, on confession, in the supreme court, for the sum of \$164.61, on the 27th day of May, 1859; that an execution issued on that judgment was delivered to one Salisbury, a deputy of the defendant, and that it was returned *nulla bona* on the same day it was issued. It was also shown, on

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the trial, that on the morning of the 30th of May, 1859, said Losee was in bed in a hotel in the county of Onondaga; that the deputy having the execution went into the room where Losee lay, and inquired for property to apply in satisfaction of the execution. Losee informed him that a trunk in the room was his, and one of two watches which lay on a table. The clothes of Losee and one Merrill which they had worn the day before were in the room, but those belonging to Losee were not pointed out, nor was his watch. The clothes of Losee were shown to be his necessary wearing apparel.

The plaintiff was permitted to prove, and did prove, the value of the watch and wearing apparel above mentioned, and the jury rendered a verdict for the value of all the articles proved, thereby including the value of the clothes. The defendant appealed to the county court of Onondaga county, and the judgment of the justice was reversed. The plaintiff appealed to this court.

Gardner & Burdick, for the appellant.

L. H. and F. Hiscock, for the respondent.

By the Court, MULLIN, J. On the trial the plaintiff proved the value of every article of clothing found in the room where Losee, the defendant in the execution, slept. These articles included the articles of wearing apparel necessary to cover the nakedness of Losee, and the judgment is for the whole value thus proved. If the necessary clothing of the debtor is not liable to execution, the judgment is erroneous and should be reversed.

Losee, not being a man of family, is not within the statutes exempting property from execution. If the clothing of a man without family is exempt, it must be by common law or by virtue of some principle of justice and policy that renders such exemption both proper and necessary.

It was a misdemeanor, at common law, for a man publicly

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to expose his naked person. It is still an offense, and punishable as such. Now if an execution creditor is entitled to take all the wearing apparel of the debtor, the latter is compelled to make such exposure of himself, or he is entitled to remain in the place where he may be found, until sufficient clothing is obtained. What private person—what keeper of a public house—is required to keep and board and clothe a debtor who may have stopped in his house? I know of none. Yet if the debtor is not entitled to such protection, the person in whose house he may be may lawfully turn him into the street naked; thus violating the law, and offending the moral sense of the community. Can it be that the law will permit such results, in order to enable a creditor to enforce the payment of his debt? If any such right has heretofore belonged to the creditor, it is time that it was declared, that the citizen is entitled to have exempt from seizure and sale on execution so much clothing as is reasonably necessary to prevent the indecent exposure of his person, and himself from suffering.

The Jewish law, more humane than the codes of christian nations, provided that when a coat was pledged it should be returned before night, to the end that the pledgor should have it for his covering in the night.

I do not believe the common law, harsh and severe as it undoubtedly was in enforcing the claims of creditors, was either so cruel or unjust as to strip the debtor of his last garment and leave him poor and naked, in violation of common decency, and to the endangering of the life and health of the debtor. In *Comyn's Digest*, (*title Process, D. 6.*) it is said that an attachment against a party for disobedience of process, or in chancery formerly, when an attachment might go against a party who neglected to appear, after service of subpoena, could not be levied on *his apparel* or on *the horse which he rode*, if he had other goods. But wearing apparel might be taken on distress for rent. (1 *Esp.* 206.) Before the passage of *2d William and Mary, chap. 5*, the landlord

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could only hold the goods and chattels taken by distress for rent, by way of pledge until the rent was paid. It would seem that while the law remained thus, wearing apparel was not liable to be taken by distress, because, as Lord Coke says, things in actual use cannot be distrained for rent. But by chapter 5, 2d *William and Mary*, the landlord was authorized to sell the distress. And Lord Kenyon says, in *Bissel v. Caldwell*, (1 *Esp.* 206, *note*,) that since that statute wearing apparel may be distrained. And in the case cited he nonsuited the plaintiff, who sued the landlord for seizing the wearing apparel of himself and family on distress for rent. It was held by Lord Holt, in *Hardesty v. Barney*, (*Comb.* 356,) that upon *feri facias* the sheriff may take any thing but wearing apparel; "nay, if the party hath two gowns, he may take one of them." In 2 *Cowen's Treatise*, 3d ed. 521, Judge Cowen gives it as his opinion that the exemption of wearing apparel existed at common law, and says it still exists, for aught he has seen to the contrary. In *Sewall on Sheriffs*, 242, it is said that the sheriff cannot seize or sell wearing apparel actually in use, belonging to the defendant, but if the party has two gowns he may take one of them.

I have been unable, after a good deal of search, to find any case which intimates a doctrine contrary to that which I have stated. It seems to me, therefore, that we must hold wearing apparel *in use* exempt from execution. These words "*in use*" might raise a doubt whether the authorities cited intended to go further than to hold that the clothes actually on a debtor's person cannot be taken. Parsons, Ch. J. in *Cook v. Gibbs*, (3 *Mass. Rep.* 193,) says a *feri facias* at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the debtor's wearing apparel from his body he would be a trespasser, for such apparel when worn is not liable to the execution.

Sunbolf v. Alford, (3 *Mees. & Welsb.* 248,) was an action of assault and battery, against an innkeeper, under the fol-

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lowing circumstances: The plaintiff and several others went to the defendant's inn and called for and were furnished tea &c. to the amount of 11s. 3d., and after they had finished their supper the defendant demanded his pay, which being refused, he took hold of the plaintiff and took off his coat and retained it as a pledge until the debt was paid. The plea setting up these matters in bar was demurred to and sustained. Lord Abinger, after saying that an innkeeper had no lien on the person of his guest, for his debt, says a man's clothes cannot be taken off his back in execution of a *feri facias*. Parker, B., speaking to the same point, says: "There is at all events no power to do what the plea justifies, namely, to strip the guest of his clothes; for if there be, then if the innkeeper take the coat off his back and that prove to be an insufficient pledge he may go on, and strip him naked, and that would apply either to a male or to a female. That is a consequence so utterly absurd that it cannot be entertained for a moment. Wearing apparel on a man's person (even if it does not extend to goods in the possession of the person) cannot be taken under a *feri facias* or under an extent." Bolland, B. says: "I have always understood the law to be that the clothes on the person of a man, and in his possession at the time, are not to be considered as goods to which the right of lien can possibly apply. The consequence of holding otherwise might be to subject parties to disgrace and duress, in order to compel them to pay a trifling debt which after all was not due, and which the innkeeper had no pretense for demanding."

We may consider, I think, without militating against the principle contended for by the defendant's counsel, that the property actually on the person of the debtor cannot be taken on execution. But it does not follow that necessary clothing when off the person temporarily may be taken. The learned judges deciding *Sunbolf v. Alford* assign as a reason why an innkeeper should not have the right to take the clothing off the guest's back, that it would result in stripping him or her

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naked—a result which they deem so absurd that it cannot be entertained for an instant. Yet the same result follows if the wearing apparel, laid off by the owner on retiring for the night, may be seized and sold. Why then permit the exercise of a power that produces such results. The same reasons which forbid taking the clothes from the person forbid their being taken from the owner's room when found off his person, if they are necessary to prevent his being left naked. And the cases cited may stand without at all interfering with the rule which exempts the necessary clothing when off the person.

The case of *Bowne v. Witt* (19 *Wend.* 475) is not an authority against the exemption claimed in this case. There the action was by Bowne against the constable for seizing, upon an execution, the plaintiff's cloak. The plaintiff claimed it was exempt under the statute (2 *R. S.* 254, § 169, 2d ed.) which exempts the wearing apparel of a householder and his family. It appeared that the plaintiff was a man of some 40 years of age, living with his stepmother, who owned a house and farm and had a family of eight persons. The plaintiff asked the court to charge the jury that under the circumstances stated he should be deemed a householder. This the court declined to do, but submitted the question to the jury, who found for the defendant. This court, on error, held that the plaintiff was not a householder, and therefore not entitled to the benefit of the exemption. It is quite obvious that the question now under consideration was not raised in that case. Yet the principle contended for would have decided that case in favor of the plaintiff if it had appeared that the cloak was a necessary article of wearing apparel, and the point had been raised. But the fact essential to present the question was not proved, nor was the attention of the court called to the point. For these reasons, the case is not an authority against the exemption contended for.

While then there is much to recommend the exemption of necessary wearing apparel from levy and sale on execution, I

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can perceive no argument, founded either on principle or policy, against it. If I am right in considering such exemption as allowed by the common law, that rule has never been overturned, so far as I can find, by any decision of the courts, or legislative enactments. By giving effect to it we prevent the necessity of indecent exposure and personal suffering; we give effect to the benevolent spirit of our religion, and the humane tendency of the age in which we live; we shield the poor and unfortunate debtor from disgrace and unreasonable annoyance, while, in ninety-nine cases out of every hundred, we do no serious injury to the creditor. The amount that any man can invest in a single suit of clothes is so small, that the withholding it from the creditor can work no injustice. While I am in favor of giving to the creditor all reasonable means to enforce the collection of his debts, I cannot consent that he shall have the power to strip his debtor naked, and leave him an object of pity and disgust to others.

It may be said that when the legislature enacted the law exempting the wearing apparel of a householder and his family, they must have understood the law to be that such property was not then exempt, and that for that reason the statute was necessary. In other words, if by the common law the property of every person was exempt from levy, then the statute exemption was wholly unnecessary. A moment's reflection will, I think, satisfy any lawyer that there is no particular force in the argument. The clothing of the wife and minor children is, in law, the property of the husband and father. On an execution, therefore, against the father, the clothes of the wife and children might be seized, even if his own clothing was exempt. It was essential, therefore, to exempt the clothing of the members of the family, or they would have been subject to seizure. The clothing of an adult, although a member of a family, not being himself a householder, is not exempt under the statute, because it is not the property of the householder. (19 *Wend. cited supra.*)

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Upon principle, as well as upon authority, I am of the opinion that the necessary wearing apparel of every debtor is exempt from levy and sale on execution; and that therefore the judgment of the justice was erroneous, and the judgment of the county court reversing it should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, July 2, 1861. *Bacon, Allen, Mullin and Morgan*, Justices.]

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BENTLEY & BURTON vs. GOODWIN.

An attaching creditor, who has not yet recovered a judgment, is not within the class of persons who can impeach the *bona fides* of a judgment confessed by the debtor, to a third person, before the levying of the attachment. That can only be done by a judgment creditor.

Decisions made at a general term of the court in any district, if expressly in point, should be followed in other districts; unless evidently made through some mistake, or they are so clearly erroneous that there can be no hesitation as to the error.

THE defendant, William Goodwin, confessed a judgment in this court to John Bellamy for \$2000, which was docketed in the office of the clerk of the city and county of New York on the 15th day of September, 1852. Execution was issued on this judgment, against the property of the judgment debtor, to the sheriff of the said city and county, who made a levy thereunder on the property of the judgment debtor, and advertised the property for sale. Before the day fixed for such sale, the plaintiffs, Bentley & Burton, presented affidavits, in the above entitled action, to one of the justices of this court. In these affidavits it was claimed that Goodwin was indebted to the said Bentley & Burton on contract, for goods sold and delivered, to the amount and value of \$732.02; that the defendant had sold and disposed

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of, at great sacrifice, considerable quantities of merchandise, from his said store, with intent to defraud his creditors; and that he had, after secreting himself for a time, absconded and left this state, taking with him the proceeds of the merchandise last mentioned. Accompanying these affidavits was the usual security, by undertaking, as required by the code, (§ 230;) and the justice to whom the application was made issued an attachment against the property of Goodwin, which was placed in the hands of the said sheriff on the 17th day of September, 1862, and the sheriff made a levy thereunder on the same property seized by him under the execution above mentioned. Bentley & Burton thereupon presented further affidavits to one of the justices of this court, setting forth the facts above stated; also various other facts which were claimed to show that the said judgment was collusively and fraudulently given; that Goodwin was not indebted to Bellamy; that the property seized by the sheriff under the execution was greatly insufficient to satisfy the judgment; that Bellamy was insolvent; and that if the said fraudulent judgment and levy were permitted to stand, the debt of Bentley & Burton would be wholly lost. On these papers the justice to whom the application was made granted an order, in this action, directing Bellamy to show cause why the said judgment and levy should not be set aside; and also directing the sheriff to stay proceedings on the levy, until the further order of this court. The motion on the said order to show cause, came on to be heard before the Hon. RUFUS W. PECKHAM, one of the justices of this court, at special term, on the 10th day of October, 1862. It was opposed by Bellamy, whose counsel raised the preliminary question that the plaintiffs, as attaching creditors, had no standing in court to attach or move against the said judgment and levy; whereupon "it was considered by the court that the said preliminary question was well taken; and it was therefore ordered that the said motion be and the same was thereby denied, with \$10 costs; that the stay of pro-

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ceedings theretofore granted be continued, with the modification that the sale proceed, and the sheriff hold the proceeds until the hearing and decision of the general term on an appeal from this order." There were no opposing affidavits read on the motion. From that portion of the order which is above quoted, the plaintiffs appealed to the general term.

John A. Bryan, for the appellant. I. On this appeal it must be assumed that the judgment is fraudulent, and that all the facts stated in the moving papers are true. (1.) There were no opposing affidavits. (2.) The merits were not inquired into on the motion, and will not be considered on this appeal.

II. The court below erred in deciding that the plaintiffs, as attaching creditors of Goodwin, had no standing in court to attack a levy under the judgment fraudulently confessed by him. (1.) The court below, without argument, rested its decision on the case of *Hall v. Stryker*, (29 Barb. 105,) decided in the supreme court, second district, at general term, February 14, 1859, which holds, that "A person claiming to be a creditor, with a warrant of attachment under the code, but with no judgment or execution for his debt, has no standing in court which will enable him to impeach and litigate the *bona fides* of a sale of goods by the alleged debtor, to a third person, which has been consummated by transfer and delivery of the possession before the lien of the warrant attached." And further holds, that "To enable a party to question and put in controversy the *bona fides* of a sale of goods, it must appear, affirmatively, that he is a creditor of the vendor; not merely that he is a person *claiming* a debt or obligation due to him from the vendor, which he proposes to establish by proof; but the character in which the attaching party prosecutes the action, or interposes the defense, and claims to overthrow the sale or conveyance, must be settled and put at rest, by the judgment or decree of a competent court." (2.) The court below was shown the subsequent case of

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Thayer v. Willet, (5 Bosw. 344,) decided in the superior court of the city of New York at general term, November, 1859, which reviews *Hall v. Stryker* at much length, and holds that an attaching creditor *has* a standing in court to attack a fraudulent sale of goods by the debtor; and that a sheriff, making a levy on those goods under an attachment, may, if sued by the vendee to recover the possession of them, set up in his answer and show, by way of defense, that such sale was fraudulent. But the court below thought that a judge sitting at special term of this district was bound by the decision of the same court at general term, (although of another judicial district,) until such decision should be reversed by a general term of this district. (3.) It was assumed by the court below, and will be admitted here, that if an attaching creditor cannot attack a fraudulent sale of goods, he cannot impeach a fraudulent judgment. (4.) The two cases above cited are, therefore, directly in point, and are squarely opposed to each other. One or the other of them must be sustained by the general term of *this* district. The question is one of great importance and should be carefully considered. (5.) We submit that the case of *Hall v. Stryker* was not considered with that care which was bestowed on *Thayer v. Willet*. In the latter, one of the justices puts a case as illustrating the manifest injustice which would result from denying to attaching creditors a standing in court to impeach the fraudulent acts of their debtors, in respect to property seized by virtue of their attachments regularly issued as authorized by law. Our case is quite as strong as that here put of the fraudulent sale by father to son. We have a judgment collusively and fraudulently confessed, to an amount large enough to sweep all the property the absconding debtor leaves behind him; it is founded on no valid consideration whatever; and the "judgment creditor" being insolvent, the attaching creditors will get nothing if they are compelled to wait till they recover judgment and issue execution. In the mean time the sheriff, if not stayed by some court of com-

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petent jurisdiction, will have sold the property under the execution and paid over the proceeds to an insolvent person.

III. Our remedy may be by motion; and this motion is regular. (1.) The sheriff could not be expected to treat the execution on the confession of judgment as a nullity; nor would he, even under a bond of indemnity from the attaching creditors, retain the proceeds of a sale to satisfy any judgment they might recover. Unless he is stayed by order of the court, he must first satisfy the execution. There was no way by which he could be made a party to an action, as in the cases of *Hall v. Stryker* and *Thayer v. Willet*. As attaching creditors, we could not sue him to recover the proceeds of a sale under the execution. (2.) Courts have control over their own judgments, whether by confession or otherwise, and may set them aside either on a motion or by action. (*King v. Shaw*, 3 John. 142. *Everitt v. Knapp*, 6 id. 331. *Frasier v. Frasier*, 9 id. 80. *Lansing v. McKillup*, 1 Cowen, 35. *Chappel v. Chappel*, 2 Kern. 215. *Dunham v. Waterman*, 17 N. Y. Rep. 9.) (3.) If by action, the only necessary parties would be the attaching creditor, and the judgment creditor; and if by motion, notice to the judgment creditor would alone be necessary. (4.) The proper title of the motion papers would be in the action of the attaching creditors against Goodwin. There is no other action. The execution was on a "judgment by confession without action." (*Code*, § 382.)

John Cheney, for the judgment creditor. I. The motion is made in this action to set aside a judgment in another action in favor of a person not a party to this action. The relief cannot be granted in this action. The motion should be entitled in the other action, or in both actions.

II. The moving parties are not judgment creditors of Goodwin, the judgment debtor in the judgment sought to be set aside. They claim to be *only* creditors at large. They have no standing in court to make this motion, or to question

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the judgment of Mr. Bellamy. (1.) In all the reported cases where the court has interfered to set aside or postpone the lien or effect of a judgment by confession, it appears by the case that the party applying for relief was a judgment creditor. (2.) In all these cases the court, in the opinions delivered, have expressly declared that it was only judgment creditors who could appeal to the court for relief, and that creditors at large could not be heard. (*Wiggins v. Armstrong*, 2 *John. Ch.* 144. *Williams v. Brown*, 4 *id.* 682. *Hall v. Stryker*, 9 *Abbott*, 342. *Schlusssel v. Willett*, 34 *Barb.* 618; see also *Willets v. Hardenburgh*, *Id.* 424. *Wintringham v. Wintringham*, 20 *John.* 297. *Beekman v. Kirk*, 15 *How.* 228, 231. *Schoolcraft v. Thompson*, 9 *id.* 63. *Winnebrenner v. Edgerton*, 8 *Abb.* 420. *Chappel v. Chappel*, 2 *Kern.* 215. *Dunham v. Waterman*, 17 *N. Y. Rep.* 12 to 14.) (3.) A judgment upon an insufficient statement is good as between the parties. Where the property of the defendant has been sold under an execution upon such a judgment, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy. (*Miller & Luther v. Earl et al.*, *Court of Appeals*, *Oct. term*, 1862, *N. Y. Transcript*, *Oct. 14*, 1862. *Neusbaune v. Kein et al.*, same court, same term, *N. Y. Transcript*, *Oct. 13*, 1862.) (4.) A judgment upon an insufficient statement is not void but voidable, and that only as to a subsequent valid judgment; and the only order to be made in such a case is to postpone it as a lien, or set it aside as against the valid judgment in favor of the party applying for relief. If the moving party has no judgment, no such order can be made. (*Chappel v. Chappel*, 2 *Kern.* 215. *Hoppock v. Donaldson*, 12 *How. Pr. Rep.* 141.) The case of *Thayer v. Willet* (5 *Bosw.* 344) is not an authority in point. There the plaintiff claimed the goods under a bill of sale. The defendant as sheriff seized the goods under a warrant of attachment. The court in that case, in rendering the decision, sheltered itself under the statute, viz: That the statute ex-

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pressly authorized an attachment against the property of a defendant who had sold or disposed of his property with intent to hinder, delay or defraud creditors; and that by implication authorized seizure under the attachment of the property so sold or disposed of, and authorized the sheriff to hold the property so seized to secure or satisfy any judgment that might be rendered, such sale being by another statute declared void, and the property as to creditors being deemed still the property of the debtor. Thus the court fortified by statute every step in the argument to sustain the proposition that a sheriff could justify the seizure of property so disposed of under an attachment in an action brought against him for such seizure. But in this case the appellants are seeking to set aside summarily, by motion, a record, viz. a prior judgment and execution and levy. The judgment must be presumed to be bona fide and valid, unless it is void upon its face. The court would not try the bona fides of the judgment on affidavits, on a motion; but on that question would give the party the benefit of a trial and the examination and cross-examination of witnesses. The court of appeals has held the object of the provisions in the code in respect to judgment by confession was the same as that of section 6 of chapter 259 of the laws of 1818; "that the objects of both statutes were precisely the same;" that "although the code does not in terms enact, as was done by the act of 1818, that a judgment confessed without a compliance with its provisions shall be 'decreed and adjudged fraudulent' in respect to 'other bona fide judgment creditors,' yet considering the object in view, it is plain that such must be its meaning;" that is, that the judgment is void as to other bona fide judgment creditors. (*Chappel v. Chappel*, 2 Kernan, 221, 222. *Dunham v. Waterman*, 17 N. Y. Rep. 12, 13, 14.) It is apparent, therefore, that the reasoning in *Thayer v. Willet* will not aid the appellants.

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INGRAHAM, P. J. We see no reason for reversing the order appealed from. The case of *Hall v. Stryker* (29 Barb. 105) was decided by the general term of the second district. That case holds that an attaching creditor is not within the class of persons who can impeach the bona fides of a judgment confessed by a debtor to a third person, before the attachment was levied. This can only be done by a judgment creditor.

The attachment is no evidence of the plaintiff's claim, or of his right to recover. In the case of a non-resident debtor, it is nothing more than the means of commencing the action, and takes the place of the summons. The fact that an attachment was issued on the affidavit of the plaintiff on an ex parte application, furnishes no greater proof of his being a creditor than the complaint verified by him does. Both state a cause of action on his part, sworn to by him; and yet it is of constant occurrence that in both cases the plaintiff fails. We concur with the general term of the second district, in the case referred to.

Even if we doubted on that point, we have often said that we considered that the decision of a general term of another district, expressly in point, ought to be followed by us, unless we were of the opinion that it was made through some mistake, or was so clearly erroneous that we should have no hesitation as to the error. Such is not the case here.

In addition to the reasons assigned in that case may be added the further ground that there is uncertainty, in all cases commenced by attachment, whether the plaintiff will ever recover a judgment. The uncertainty as to the plaintiff's rights is of itself sufficient ground to deny such a motion. If granted and the plaintiff should not recover judgment, injustice would be done to the party having the judgment and entitled at any rate to the security of the judgment for his debt, as between him and his debtor, even if the statement on which the judgment was confessed should be defective.

The order appealed from should be affirmed.

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LEONARD, J. I concur in the result of the above opinion, upon the ground only that the attaching creditor may not institute actions or proceedings to test the validity of the rights of other claimants, before judgment has been rendered in favor of the attaching creditor.

PECKHAM, J. concurred.

Order affirmed.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham*, Justices.]

 BUTLER, trustee &c., vs. TOMLINSON and others.

In an action for foreclosure, commenced previous to the amendment of the 182d section of the code, in 1862, a grantee of land was not charged with constructive notice of the commencement of the suit, although a *lis pendens* had been filed, unless the summons had been served on his grantor before the conveyance of the land.

THIS was an appeal from an order made at a special term denying a motion made in a foreclosure suit that Joseph N. Balestier, the purchaser of a part of the mortgaged premises sold under the decree, be compelled to complete his purchase.

The case was submitted on the following statement of facts, agreed upon by the counsel for the respective parties: The complaint and the notice of *lis pendens* were filed on the 23d of January, 1862; Peter A. Youngblood, who then owned the legal title of record, being mentioned in both as a defendant. On the 24th of January the summons was served on the defendant Tomlinson, and on the 25th on other defendants. On the 29th of January an order was made, requiring service of the summons to be made on the defendant Youngblood as a non-resident residing in New Jer-

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sey, by publication for six weeks. The purchaser's sole objection to the title was that, before such service on Youngblood by publication was complete, a conveyance of the legal title in the premises from him to one who had not been made a party to the suit was duly recorded. Such transfer was in fact recorded on the 1st day of February, 1862, after the filing of the complaint and notice of *lis pendens*, after the actual service of summons on several parties, and after the order for publication. The conveyance of the legal title, before mentioned, was proved on the 24th of January; the record so showing.

Joseph H. Choate, for the appellant.

J. N. Balestier, purchaser, in person.

By the Court, LEONARD, J. The court is deemed to have acquired jurisdiction, and to have the control of all subsequent proceedings, in a civil action, only from the time of the service of the summons. (*Code*, § 139.)

Where the service is by publication, the summons is not deemed to be complete until the expiration of the time prescribed for publication. (*Code*, § 137.)

Notice of the pendency of an action has no effect until the action is commenced. Notice cannot be given of a fact which does not exist. Hence, although the code (§ 132) permits such a notice to be filed at the time of filing the complaint, it can only be effectual for the purpose intended from the time it becomes really a notice of the fact that an action has been commenced. Prior to the service of the summons the court has acquired no jurisdiction, and has no control over any proceedings in the action, except in cases where there has been a voluntary appearance.

For these reasons, the grantee of land is not charged with constructive notice of the commencement of an action for foreclosure, although a *lis pendens* has been filed, unless the

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summons has been served on his grantor before the conveyance of the land.

This embarrassment in foreclosure cases has been cured by an act of the legislature passed since this action was commenced; but it has no retroactive effect to cure the difficulty here.

The order must be affirmed, with \$10 cost of appeal.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Barnard*, Justices.]

COLWELL vs. LAWRENCE & FOULKS.

Where a complaint averred an assignment by an insolvent partnership firm to the plaintiff, in trust for the benefit of creditors, and the defendants on the trial admitted the execution of the assignment as averred in the complaint; *Held* that the defendants were precluded from afterwards raising the objection that the assignment was not executed by all the partners.

Held, also, that the objection was one which should have been made on the trial, because the want of signature of one of the partners might have been remedied by proof of his assent to the signature of the firm.

Where a contract for doing a piece of work in building a vessel, contained a stipulation for the completion of the work on or before a specified time, "under a forfeiture of one hundred dollars per day for each and every day after the above date, until the same is completed," *Held* that the sum specified was not to be deemed liquidated damages.

This case of *Cothrel v. Talmage*, (5 *Seld.* 551,) distinguished from the present case.

Where the contract is of such a character that it can be separated, as to performance, so as to admit of an assessment of damages for a breach of one part, and not the other, the party should not, for a trifling omission, be made responsible for the whole amount of damages specified.

The testimony of an expert is admissible to explain technical terms in a contract; also to explain the meaning of provisions used in a specification for building steam engines.

A PPEAL from a judgment entered upon the report of a referee. The plaintiff, as assignee of the limited partnership of Berkbecks & Hodges, sued the defendants to re-

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recover an amount due for steam engine work. The plaintiff's demand was twofold: 1st. For a balance due on a contract job, and some extras connected therewith, amounting to \$2064.62. 2d. For an amount of a bill for alterations and additions, made on changing the form or construction of a plan of two engines from being disconnected, into being connected. Amount \$1283.35. Total claim \$3347.97. The following facts were found by the referee. *First.* That on the 28th day of May, 1857, George Birkbeck, jun., John Birkbeck and Andrew B. Hodges, and one Grahams Polly, were copartners in trade, doing business in the city of New York, as machinists and boiler makers, under a limited copartnership under the statute, under the firm name of Birkbecks & Hodges; in which copartnership George Birkbeck, jun., John Birkbeck and Andrew B. Hodges were general partners, and said Grahams Polly was a special partner, and that on the day last aforesaid the defendants were copartners, engaged in ship and steamboat building in the city of Brooklyn, under the firm name of Lawrence & Foulks. *Second.* That on the day last aforesaid the defendants being engaged in building a certain steamboat, (called the General Concha,) entered into an agreement in writing in their firm name with said firm of Birkbecks & Hodges, in the words and figures following, viz: "This agreement, made at New York this 28th day of May, 1857, between Lawrence & Foulks of Brooklyn, of the first part, and Birkbecks & Hodges of the city of New York, of the second part, witnesseth: That the said Birkbecks & Hodges agree, for and in consideration of the sum of money hereinafter mentioned, to furnish the materials, build and put up complete, on board a boat to be furnished by the parties of the first part, two inclined condensing steam engines, with one boiler, and wooden water wheels, without iron rims, all as per our letter under date of May 8, 1857, and to the satisfaction of the parties of the first part, or other competent judges, and to have the same completed, ready for steam, on or before the 15th October

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next, under a forfeiture of one hundred dollars per day for each and every day after the above date, until the same is completed as above. And this last obligation of forfeiture is not to be binding on the parties of the second part, if a fire should destroy any of the parts of the machinery or hull. In consideration of the faithful performance of the above by the parties of the second part, the parties of the first part agree to pay for the same the sum of eight thousand dollars, \$8000. In testimony whereof, we have hereunto set our hands at the city of New York, on the day and year above written. (Signed) LAWRENCE & FOULKS." *Third.* That said Birkbecks & Hodges entered upon the performance of aforesaid contract, pending which work divers alterations were made, and materials furnished, at the request of said Lawrence & Foulks, and under their agreement to pay therefor, in addition to said sum of \$8000. That said work, provided for in aforesaid contract of 28th of May, and letter of 8th May, 1857, was not finished and completed by said Birkbecks & Hodges until about the middle of February, 1858. *Fourth.* That on or about the 26th day of December, 1857, the said Birkbecks & Hodges, and Lawrence & Foulks, adjusted the amount due the former for work up to that time done on said boat, the General Concha, at the sum of \$1675.39, allowing the latter the sum of \$8000 for work done upon a steamboat called the Virginia. *Fifth.* That there is due and owing from the defendants the further sum of \$173.35, for work done and materials furnished upon and for said General Concha, after said 26th December, 1857, by said Birkbecks & Hodges. *Sixth.* That there is due and owing (and was so before the 25th day of September, 1858,) to the said Lawrence & Foulks by the said Birkbecks & Hodges, (over and above aforesaid \$8000, allowed them on aforesaid adjustment,) the sum of \$781.68. *Seventh.* That on about the 25th day of September, 1858, the said limited copartnership of Birkbecks & Hodges, (composed as aforesaid,) under their hands and seals, duly assigned, transferred

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and set over to the plaintiff, Joseph Colwell, all their partnership effects and assets—all claims, dues and demands owing them, including the said indebtedness of the defendants; said assignment being made for the benefit of the creditors of Birkbecks & Hodges. *Eighth.* That by virtue of said assignment, the plaintiff became the lawful owner and holder of the claim and demand in this action, against the defendants, and still is such owner and holder. And, as conclusions of law, the referee held and decided that the defendants were entitled to offset the said amount of \$781.61, found due them, against the amount of \$1676.39, and \$173.35, (in the aggregate, \$1849.73,) found due Birkbecks & Hodges. *Ninth.* That the plaintiff was entitled to recover of and from the defendants the sum of \$1255.40, with costs.

On the trial, Joseph Belknap, a witness for the plaintiff, testified that he was an engineer, and had been for about 25 years, and had had extensive business; was one of the firm of Cunningham, Belknap & Co.; had 300 men in employ at once. Being shown exhibit No. 14, and specification and contract in answer, he testified: "They do not call for connecting the engines by a center shaft." The answer was taken subject to the defendants' objection, that it was a question of law.

Judgment being entered upon the report, the defendants appealed.

John S. McCulloh, for the appellants.

D. McMahon, for the respondent.

By the Court, INGRAHAM, P. J. This action was brought by the assignee of an insolvent firm, to recover moneys due upon contracts with the firm for work, &c. The case was referred, and the referee has reported for the plaintiff. The various exceptions taken by the defendants will be noticed in the order in which they were submitted in the defendants' points.

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1st. The defendants object to the plaintiff's title under the assignment, upon the ground that the assignment was not executed by all the partners. Whatever force there would have been in this objection if properly presented, the defendants cannot receive any benefit from it in this action. When the assignment was offered to be proved, its execution as averred in the complaint was admitted. This admission concludes the defendants. The objection also is one which should have been made on the trial, because the want of signature of one of the defendants might have been remedied by proof of his assent to the signature of the firm, and which was in fact proven.

2d. It is objected that there was an implied warranty that the article should be fit for the purpose contemplated, and that the defendants were entitled to recover a claim for extra charges caused by the non-performance of the assignors' contract. There is no special finding of the referee as to this item. He allowed the defendants an offset of \$781.68. Of what this sum was composed it is not easy for us to discover; nor is it material. The evidence as to the performance of the contract by the plaintiff's assignors, of the waiver of that performance and extension of time for performance, as well as the value and amount of the defendants' set-off, raised questions of fact for the decision of the referee. Even if we differed from him on such finding, the evidence is of that character to render his finding conclusive.

3d. It is objected that the damages for non-performance of the contract within the stipulated time were liquidated damages, and that the defendants were entitled to recover these damages at one hundred dollars per diem. Independent of the provision of the contract making this a forfeiture, I think the cases do not warrant the conclusion that this amount was to be considered as liquidated damages. The case which throws most doubt upon this question is that of *Cothrel v. Talmage*, (5 *Selden*, 551;) but in that case the contract was of that particular character which could not be separated

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as to performance, so as to assess damages for a breach of one part and not the other. The judge said, in referring to that case, "from the nature of the adventure, the amount of gain by a strict performance of the contract could not be foretold, and the amount of loss could not be ascertained by proof. The liquidation of the damages by contract between the parties was therefore prudent and reasonable." Here the contract was for doing a piece of work in building a vessel. The defect in completion might have been a hinge, or a lock, or some trifling matter which a very little expense would remedy, and consequently a very small amount of damage would be the result. To hold, under such circumstances, that this would warrant the recovery of the amount of damages named as liquidated would operate very severely, and should require a clear expression of the intent of the parties. The distinction between this and the case above referred to is, that here the damage can be easily ascertained, and should have been remedied by the defendants instead of asking for a daily penalty for the non-performance. Selden, J. says, in *Cotheal v. Talmage*, "The only plausible ground for withholding the doctrine (of liquidated damages) is that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party." This I suppose to be the true rule as it is to be drawn from the code, and the application of this rule to the present case would sustain the finding of the referee.

I am free to say that I have never been able to see the propriety of denying to the parties in any case the right to fix the amount of damages to be recovered in case of non-performance of a contract, and have always thought where the parties have agreed on a sum which they say shall be liquidated damages, that they should be held to their contract as they make it. There will now and then be an apparently hard case, but the establishment of such a rule when clearly

understood, would make parties more careful in making contracts, and would relieve the courts from many gross contradictions, which now exist in the cases on this subject. We do not feel at liberty to adopt this as the rule in all cases, with the decisions before us, and must leave it to the higher court, if it should think it best, to overrule these decisions.

4th. Whether or not there was an adjustment of the amount due between the parties, was a question of fact for the referee. His finding is consistent with the evidence.

5th. The same remarks apply to the alleged counter-claim for extra charges of work on "The Virginia."

6th. The ruling of the referee as to the conversations in regard to the Concha, prior to the written contract, was not erroneous. Those conversations were merged in the written contract. They were in no sense admissible, unless to explain some terms which could not be otherwise understood. No such object was avowed, and it is clear that no such reason existed to admit the testimony.

7th. The question put to Belknap was one put to an expert on a matter with which the court or jury could not be supposed to be conversant, and as such was admissible. Such evidence is admissible to explain technical terms in a contract, and also, as in this case, to explain the meaning of provisions used in a specification.

My conclusion is that the referee committed no error which calls for a reversal of this judgment.

Judgment affirmed, with costs.

[NEW YORK GENERAL TERM, November 3, 1862. *Ingraham, Leonard and Peckham*, Justices.]

STOCKWELL vs. VEITCH and HILLIER.

The 34th section of the act of March 30, 1850, in relation to the assessment and collection of taxes in the city of New York, &c. (*Laws of 1850, p. 188,*) authorizing a levy, for a tax, upon the goods and chattels of the person against whom a warrant is issued, or upon goods and chattels in his possession, &c. was not intended to cover a mere constructive possession, where there is not a sole and actual possession.

The act is to be construed strictly, and no property which is not actually in possession of the party who is taxed should be held liable to seizure.

If the property does not belong to the person assessed, it must be solely in his possession.

THIS is an action brought to recover possession of personal property, commenced July 8, 1858. The plaintiff, a resident of Kentucky, was the owner of ten barrels of whisky, which he consigned for sale, on his account, to the firm of Purdue & Ward, consisting of John Purdue and John S. Ward, commission merchants, New York. Purdue & Ward placed the goods on storage, subject to their order, or that of the plaintiff, with John H. Brust, who had a place of business in the same building, but independent of Purdue & Ward. While the goods were thus situated they were seized by the defendant Hillier and placed in possession of the other defendant, for sale by him, under a distress warrant for the collection of a tax for the year 1857, against Purdue individually; whereupon, after demand made, the plaintiff brought this action. The answer of the defendants substantially justified the taking and detention, under the distress warrant, of the property in question as the property of Purdue, and in his possession. In relation to the tax against Purdue, the following facts appeared: From the fall of 1856 to the time of the trial, Purdue was a resident of the state of Indiana, and was in partnership with John S. Ward, in Brooklyn. In 1857 (the year in which the tax in question was laid against him) he had no property or money invested in the city and county of New York, and did not reside there, nor had he or Purdue & Ward any place of business

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in the city or in the state of New York. Indeed, from the fall of 1856, up to the time of the trial, he had not been in business on his own account, either in New York or Brooklyn. In the spring of 1858, Purdue & Ward opened an office for the reception of orders &c. at 39 Pearl street, their business being still conducted in Brooklyn, and during that spring the ten barrels of whisky in question belonging to the plaintiff were shipped to New York, to the care of Purdue & Ward, consignees and agents of the plaintiff, to sell, or subject to his order, should he see fit to put it in other hands. Purdue & Ward, as before stated, stored the property with Brust, in whose possession it was seized. Purdue & Ward had no property or interest in the whisky. The tax against Purdue was for the year 1857, and was imposed upon him in terms as a non-resident, under the law of 1855. (*Laws of 1855, ch. 37.*) The testimony being closed, the court instructed the jury that it was the intent and meaning of the statute that where an individual was assessed and taxed, the tax should be collected exclusively from his individual property, and could not be collected from property in which he was jointly interested with another; and that in this case the property not being his, nor in his possession, the constable had no right to levy upon it, nor could he levy upon it as the copartnership property of Purdue & Ward, under a warrant against Purdue individually; and that they should find a verdict for the plaintiff: to which the defendants' counsel excepted. The jury thereupon rendered a verdict for the plaintiff, and assessed the value of the goods levied upon at \$400; and the court thereupon ordered entry of judgment upon the verdict to be suspended, and that the defendants' exceptions should be heard in the first instance at the general term of the court.

A. R. Dyett, for the plaintiff.

Henry H. Anderson, for the defendants.

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By the Court, INGRAHAM, P. J. The amended statute (see act of 1850, p. 194, § 34,) authorizes a levy, for a tax, upon the goods and chattels of the person against whom the warrant issued, or goods and chattels in *his* possession, where-soever the same shall be found within the city; and provides that no claim of property to be made to such goods and chattels so found in the possession of the said party, shall be available to prevent a sale.(a) To come within these provisions, the property levied on must be either, the property of the person assessed, or the goods must be actually in the possession of such person.

In the present case, the goods were consigned to a firm in the city of New York, of which the person assessed was a member. He did not have the actual possession of the property. It was only constructively that he could have even a partial possession with another. The officer having the warrant had no authority to take the property from the possession of the other partner, and in doing so he was a trespasser. The law did not provide for such a case. Nor do I think it was intended to cover a mere constructive possession where there was not a sole and actual possession. Oppressive as such a law is, it should be construed strictly, and no property which is not actually in possession of the party who is taxed should be held liable to seizure.

I am of the opinion that if the property does not belong to the person assessed, it must be solely in his possession. The case of *Sheldon v. Van Buskirk*, (2 Comst. 473,) was

(a) This act is amended by the act of February 27, 1855, which declares that all persons and associations doing business in the state of New York, as merchants, bankers or otherwise, either as principals or partners, whether special or otherwise, and *not residents of this state*, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state; and that said taxes shall be collected from the property of the firms, persons or associations to which they severally belong. (*Laws of 1855, ch. 37.*)

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one in which the property was proved to be in the possession of the person against whom the warrant issued, and is not applicable to this case.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham, Justices.*]

SCHULAR *vs.* THE HUDSON RIVER RAIL ROAD COMPANY.

In an action for an injury to property, alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer denying every allegation in the complaint puts in issue the defendant's liability; and it is not necessary to aver that the injury was done by other persons, who were responsible therefor, and not the defendant.

D. & M. had an absolute contract with a rail road company to draw its cars, over a certain portion of the road, to furnish the horses and drivers for that purpose, and to assume the entire control of the work. *Held* that while D. & M. were in the performance of this contract, the rail road company could not be made liable for the negligent acts of D. & M.'s employees.

MOTION for a new trial, on a case and exceptions. The action was to recover damages for an injury done to the plaintiff's horse and wagon, by means of a collision with one of the cars of the defendant in a street in the city of New York, alleged to have been caused by the negligence of the defendant's agents. The answer was a general denial.

The injury complained of resulted exclusively from the inattention of the car driver. His was the only negligence proved or suggested. The driver was in the employ of Davis & Myers, who had contracted to haul the cars for the defendant, with their own horses, equipage and drivers. He was hired by them, received his pay from them, was under their control, and looked to them for directions. He was in sole charge of the car at the time; no other help on the car. The contract showed an independent employment by Davis

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& Myers, as contractors to do certain work, as directed by the superintendent of the company. The character of the work was specified in the contract, the place where it was to be performed and the time in which it was to be done, and the compensation, which was "by the job." The contractors were to furnish all the drivers, and to indemnify the company against all claims like the present. They also agreed to discharge any driver on request of the superintendent; but there was no method of enforcing such discharge, except by terminating the contract. The company were not to hire or pay the drivers, and could not discharge them. Nor had the company any control of the driver when at work, nor of the speed of the car or the mode of driving. The company might direct what cars should be hauled and to what stations, but their only control over the manner in which the contractors performed the work was by their power to terminate the contract. The defendant claimed that under these circumstances the action should have been brought against Davis & Myers, and not against the rail road company. The plaintiff was nonsuited, on the trial.

J. C. Van Loon, for the plaintiff, cited *Mayor &c. of New York v. Bailey*, 2 Denio, 433; *Bush v. Steinman*, 1 Bos. & Pul. 404; 4 Ohio Rep. 399; 2 E. D. Smith, 254; 15 Pick. 297; 23 id. 24; 19 N. H. Rep. 127.

T. M. North, for the defendant, cited *Blake v. Ferris*, 1 Seld. 48, 56, 57 and cases there cited; *Weyant v. N. Y. and Harlem Rail Road Co.*, 3 Duer, 360; *Pack v. Mayor &c. of New York*, 4 Seld. 222; *Kelly v. The Same*, 1 Kern. 432; *Norton v. Wiswall*, 26 Barb. 618; *Blackwell v. The Same*, 24 id. 355; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Felton v. Deuel*, 22 Verm. Rep. 170; *Scott v. Mayor &c.*, 37 Eng. Law and Eq. Rep. 495; *Sadler v. Henlock*, 30 id. 167; *Reedie v. London and N. W. R. Co.*, 4 Each. Rep. 258.

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By the Court, INGRAHAM, P. J. The plaintiff's horse and wagon were injured by a collision with a car of the defendant at the corner of Hudson and Canal streets, in the city of New York. The defense was that the cars of the defendant were driven by men in the employ of Davis & Myers, under a contract with them, and that *they* were responsible, and not the defendant. The plaintiff was nonsuited on the trial.

The first objection is to the sufficiency of the answer to admit of this defense. The answer denies every allegation in the complaint. The complaint charges that the agent of the defendant was driving the car, and caused the collision. A denial of this fact puts in issue the defendant's liability, and it was not necessary to aver the contract with Davis & Myers. Even if it was necessary, we think it was sufficiently averred in the answer.

The other question is whether the contract with Davis & Myers relieved the defendant from liability arising from the acts of one of the employees of Davis & Myers. They had an absolute contract with the company to draw the cars, to furnish the horses and drivers, and to assume the entire control. While those persons were in the performance of their contract, I see no ground upon which the defendant could be made responsible, under the decisions in *Blake v. Ferris*, (1 *Seld.* 48;) *Pack v. Mayor &c. of New York*, (4 *id.* 222;) *Kelly v. The Same*, (1 *Kern.* 432,) and other cases which might be cited. The defendant had nothing to do with the driving of this car, any more than the parties in the cases cited had to do with the work which they had contracted to have done for them. The right to control the contractor or to terminate the contract, if the work was not done to the satisfaction of the defendant, does not alter the liability, according to the decision of the court of appeals in the case of *Pack v. The Mayor &c. of New York*. In that case, upon the second trial, I thought that inasmuch as the contract placed the work under the control of the street commissioner, a different rule might be adopted. But Mason, J.

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in that case, said, "The clause does not constitute the workman any more the immediate agent or servant of the defendants than if such provision was not inserted in the contract."

I see no difference between the liability in this case and that which arises from an injury in building the road. If done under a contract, it has been repeatedly held that the company was not liable.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 8, 1862. *Ingraham, Leonard and Peckham*, Justices.]

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COOKINGHAM *vs.* LASHER.

Where one copartner makes a sale or disposition of the partnership property, in his own name, and without disclosing the name of his copartner or copartners having an interest therein, and at the same time makes a warranty of the soundness thereof, also in his own name, an action may be maintained against him for a breach of the contract of warranty, without joining his copartner, in the action.

A partner having made a contract in his own name, and not in the name of himself and his copartner, cannot be allowed to turn the other party to the contract over to a litigation with a stranger, simply because the latter has an interest in the property sold.

APPEAL from a judgment entered on the report of a referee. The opinion of the court details all the material facts. The referee reported in favor of the plaintiff for \$150, besides costs.

J. W. Elseffer, for the plaintiff.

J. Olney, for the defendant.

By the Court, BROWN, J. This action is brought to recover damages for a breach of a contract of warranty, made

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upon an exchange of horses, at Rhinebeck, in March, 1859. The defendant, in his answer, sets up a general denial, and waives other defenses to the merits of the claim, which need not be particularly named, as they were disposed of by the referee and are not made a ground of this appeal. The defendant also alleged as a defense that at the time of the exchange of the horses, the defendant and one Daniel C. Deyeo were joint owners of the horses transferred and sold to the plaintiff, and that the contract of warranty, if any was made, was the joint contract of the defendant and Daniel C. Deyeo, who was then living and residing at Lexington in the state of New York, and should have been joined as a party with the defendant in the action, while said Deyeo and the defendant were at that time copartners in the business of buying, selling, trading and exchanging horses. The trial of the action was referred to Ambrose Wager, Esq. one of the counsellors of this court, who, after hearing the proofs, &c. of the parties, made a report in favor of the plaintiff, for the sum of \$150 besides costs, upon which judgment was entered. The referee, amongst others, found the following facts: 1st. That the defendant and Daniel C. Deyeo, at the time of the sale and transfer of the horses to the plaintiff, were copartners in the business of buying, trading and selling horses, and were at the time joint owners of the horses sold and transferred to the plaintiff. 2d. That at the time of the transfer and sale the plaintiff had no knowledge or notice of the copartnership between the defendant and Deyeo, or that they were joint owners of the horses sold to the plaintiff. And 3d. That the defendant sold and transferred the horses to the plaintiff in his own name, and so also made the representations of warranty mentioned in the complaint. And he found, as his conclusions of law, that where one copartner makes a sale or disposition of the partnership property, in his own name, and without disclosing the name of his copartner or copartners having an interest therein, and at the same time makes a warranty of the soundness thereof,

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also in his own name, an action may be maintained against him for a breach of the contract of warranty without joining his copartner in the action. To this finding and conclusion of the referee the defendant excepted.

The power of one copartner to transact the whole business of the firm, whatever that may be, and consequently to bind his copartner to the same extent as himself, results from the contract of copartnership; for without such authority the business of the firm could not be effectively and successfully prosecuted. If that business is to buy and sell goods and property, and as goods and property are usually bought and sold on credit, any person who deals with the individual partner has a right to consider his acts as those of the company, whoever may compose it. If he buys on credit, the presumption is that the credit is given to the firm, and the firm are consequently liable to pay the debt thus contracted. A warranty of the title, on a sale of personal property, is implied as an incident of the sale, and so the power of one copartner to make an express warranty as to the quality or the quantity of the goods sold would be implied, as necessary and indispensable to the effectual exercise of his general power to act for and bind the firm. The power of one copartner to bind the firm of which he is a member, in all that relates to its legitimate business, is but another expression of the law of agency. The individual copartner is the agent for the firm, and acts for it within the scope of his authority, which is to be ascertained by reference to its particular business and the powers necessary to an effectual prosecution thereof. The case of *Van Keuren v. Parmelee*, (2 Comst. 524,) which overturned a rule long prevalent in this country and inherited from the English courts, rests upon the recognition of this law of agency in its application to copartners. It denied and repudiated the power of one copartner to rescue a claim from the operation of the statute of limitations by a promise made after the dissolution of the firm. Judge Bronson, in the opinion of the court, after a statement

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of the facts, says: "This leads to an inquiry concerning the principle on which each partner can bind his associates. And it is generally agreed it is the law of agency. Each partner, when acting within the scope of the partnership, is deemed to be the authorized agent of all his fellows. The authority is presumed from the nature and necessity of the case; for without it third persons would not be safe in dealing with one of the associates, and the business of the partnership could not be carried on with success. Now how long does this presumed agency exist? Clearly no longer than the necessity for it exists, and for most purposes the necessity ceases with the termination of the partnership." I refer to this principle for the purpose of using it in connection with another, which affects materially the theory of the defense in this action. The proof shows, and so the referee has found, that the contract of warranty was made by the defendant in his own name, and that he did not disclose to the plaintiff that he was acting for his firm, or that any other person had any concern or interest in the property sold to the plaintiff. If he intended to share the responsibility of what he was doing with another, he was bound to make that known at the time, and communicate to the purchaser the name or the names of the others who were parties to the contract. Having made the contract in his name, and not in the name of himself and copartner, he cannot be allowed to turn the plaintiff over to a litigation with a stranger, simply because the latter had an interest in the property sold. The plaintiff's contract was with him alone, and not with him in connection with another, and for the breach of it the plaintiff may look to him alone. "If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to his principal in case the agent had authority to bind him." (2 *Kent's Com.* 630.) "A person contracting as agent will be personally responsible

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when at the time of making the contract he does not disclose the fact of his agency, but he treats with the other as principal, and it follows irresistibly that credit is given to him on account of the contract. These are elementary principles, and show that the defendant cannot evade his personal liability to the plaintiff, nor compel him to bring in another person to divide the responsibility with him because the plaintiff contracted with him alone and not with him as the agent of a copartnership, of which he is one of several members. In order to bind the partnership in any contract with third persons, it is ordinarily necessary that it should be made in the name of the firm. And if made by one partner, in his own name only, it will ordinarily be binding upon himself and not upon the partnership. There are exceptions to this rule when the contract is made by one partner in his own name, for and on behalf of the partnership, or for the benefit thereof, and yet the firm will be bound thereby." (*Story on Partnership*, § 243.) "The non-joinder of a dormant partner, as co-defendant, cannot even be pleaded in abatement when the plaintiff has no means of knowing of the partnership. For if I deal with A. he cannot in reference to that transaction say there is a contract between him and B., of whom I know nothing; thus compelling me to be a joint creditor of those two whose joint property may be scarcely any thing, and not the sole creditor of the only man I know. If the creditor, at the time of the contract, was ignorant that his debtor had a dormant partner, he may at his option sue the debtor separately or jointly with the dormant partner. But if he was not ignorant of that fact, he should regularly make the dormant partner a co-defendant with the ostensible partner. If he does not, and the non-joinder is objected to, it will be left to the jury to say with what parties the contract was intended to be made." (*Collyer on Partnership*, § 719.) Numerous authorities are referred to in the notes, and particularly *DeMantort*

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v. *Sanders*, (1 *Barn. & Adol.* 396.) The referee in this case has found expressly that the contract of warranty was intended to be made between the plaintiff and the defendant.

The judgment should be affirmed.

[KINGS GENERAL TERM, February 9, 1863. *Brown, Scrugham and Lott*, Justices.]

EVERETT CLAPP, individually and as administrator &c., *appellant*, vs. GRACE C. MESEROLE and others, *respondents*.

Upon a settlement of the accounts of an administrator *de bonis non*, with the will annexed, before the surrogate, legatees should not be charged with the sums decreed by the surrogate, to be paid to them, respectively, upon the final settlement of the accounts of superseded executors, but only with the advances charged to them in the will, and the money actually received by them from the estate.

A decree of the surrogate, ascertaining the amount of money in the hands of executors for distribution, and directing in what manner it shall be distributed, is not a satisfaction or extinguishment of the claims of those to whom the money is made payable, to the extent of such amounts, respectively.

A provision in such a decree, directing the executor to pay over the balance found to be in his hands, in execution of the trusts of the will, is not a payment, so as to discharge him; nor is it a payment, so as to exonerate the fund distributable and charge the person to whom it is made payable.

Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the claim of the distributee.

Though the decree of the surrogate gives to each distributee a remedy against the executor personally, for his proportion of the fund found to be in the hands of the executor, this is only cumulative, and will not impair the remedy against the fund itself.

THIS was an appeal, by Everett Clapp, individually, and as administrator *de bonis non* with the will annexed, of Simon Richardson, deceased, from a decree made by the surrogate of the county of Kings, on a final settlement of his accounts. The opinion of the court contains a statement of the material facts.

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Jesse C. Smith, for the appellant.

James L. Campbell, for the respondents.

By the Court, BROWN, J. Letters testamentary upon the last will and testament of Simon Richardson were granted, on the 26th of November, 1850, by the surrogate of the county of Kings, to the widow, Ann Richardson, the two sons of the testator, William S. Richardson and Stephen F. Richardson, and to his brother Marvin Richardson. The widow and the two sons were also entitled to distributive shares of his estate. In April, 1857, the letters were revoked as to Marvin Richardson, and the widow died previous to the year 1859, leaving William S. and Stephen F. the executors of the will. On the 12th May, 1856, William S. and Stephen F. Richardson assigned and conveyed all their interest and claim in and to the estate, as legatees or otherwise, to certain persons through whom the appellant Everett Clapp became the owner of their right and interest, previous to the year 1859. On the 3d of February, 1859, the appellant, as such assignee, applied to the surrogate for an order requiring the executors to account; upon the return of which Stephen F. Richardson appeared and presented his petition for a final settlement; and such proceedings were had thereon that a decree for such final settlement was made and entered on the 1st of June, 1861. By this decree William S. Richardson and Stephen F. Richardson, as such executors, were adjudged and decreed to pay to Grace C. Meserole and others, the respondents in this proceeding, respectively, certain sums of money in the decree specified for their shares under the will, from the assets and proceeds of the estate in the hands of the executors for distribution. On the 14th of October, 1859, while the proceedings for the final accounting were being had, William S. and Stephen F. Richardson were superseded in their office as executors, by an order of the surrogate. And on the 13th of December of the same year, Everett Clapp, the appellant, was duly ap-

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pointed administrator with the will annexed, of the goods, chattels and credits of Simon Richardson, left unadministered. On the 1st of July, 1861, Everett Clapp as such administrator was ordered to render an account. He applied for a final settlement, and a decree therefor was made on the 4th of March, 1862, from which this appeal is taken by him.

The distributees entitled to the estate are numerous, and the sums awarded to each are specifically set out in the decree, and need not be repeated here. The error complained of does not consist of a miscalculation of figures, nor of the allowance or disallowance of any item of the administrator's accounts. No exception is taken to them. The appellant, in his seventh point, alleges that the decree is erroneous in this respect: That it charges each legatee only with the advances charged to them in the will and the money actually received from the estate. He insists they should be charged also with the sums decreed to be paid to them respectively by the decree upon the final accounting of William S. and Stephen F. Richardson, of the date of the 1st of June, 1861, before referred to. It is thought and claimed by the appellant that the decree for the sums of money in the hands of the superseded executors, at the time of the final accounting by them, is a payment and satisfaction *pro tanto* of their shares of the estate. The distributees have done nothing to prejudice or impair their claim upon the trust property. They have been passive throughout. There is no proof that any part of these moneys has been paid. Indeed it is not alleged they are paid; but the decree ascertaining the balance of moneys in the hands of the executors for distribution at \$24,646.03, and directing the manner of its distribution, is said to be a satisfaction and extinguishment of the claims of those to whom it is made payable, to the extent of such amounts respectively. In this view I cannot concur. It must be borne in mind that the primary object of the proceeding which resulted in the decree of the 1st of June, 1861, was the final settlement of the accounts of the two Richard-

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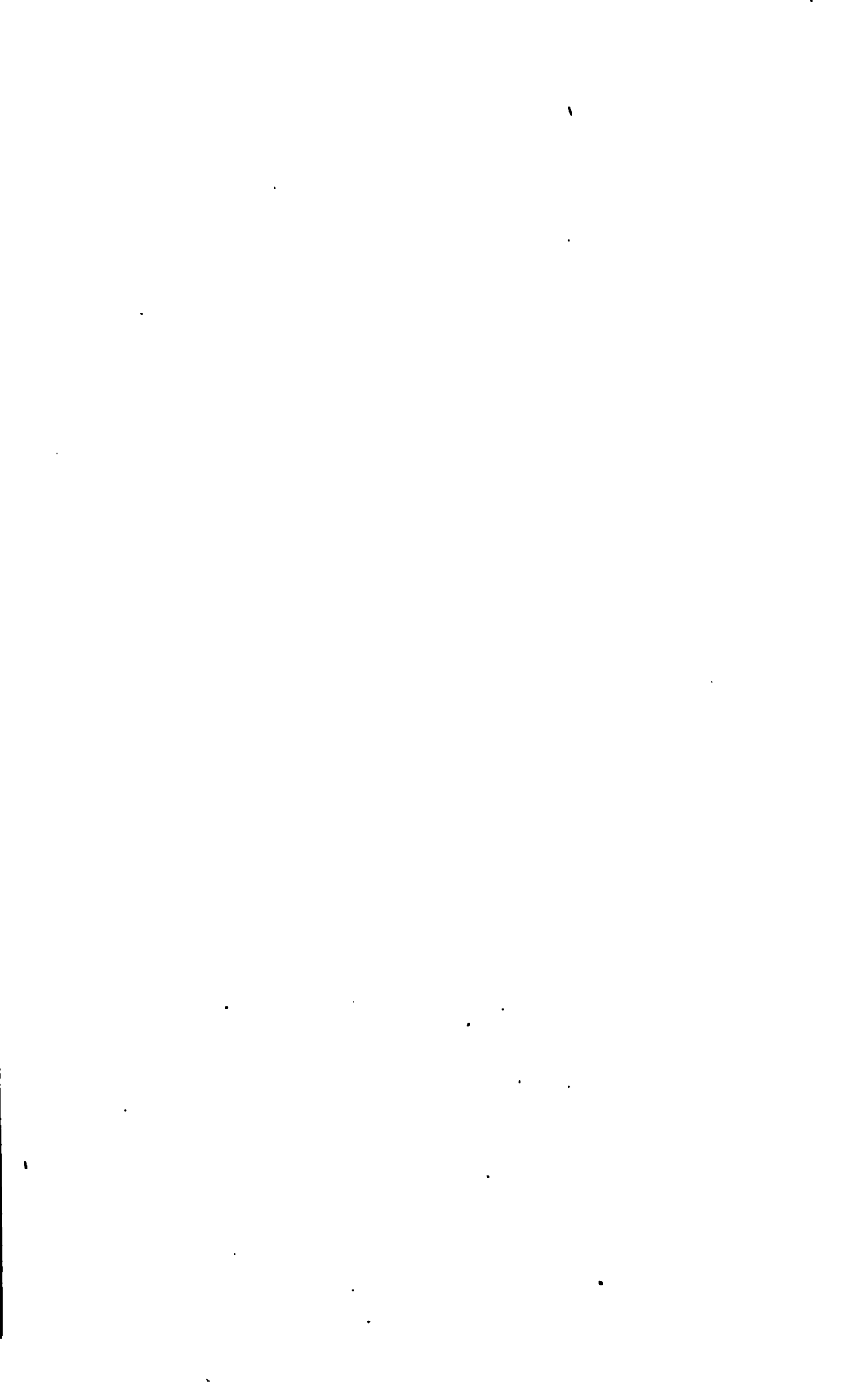
sons as executors. The statute declares who shall be concluded by the decree, and of what it shall be conclusive. The proceeding is a substitute for the old action by bill filed by the executors for the settlement of their accounts and to be relieved and discharged from the trust. The primary relief is sought by and granted to them. It concludes creditors, next of kin, legatees and all persons interested in the estate, upon whom the process has been served, upon the following facts and no others: 1st. That the charges for moneys paid to creditors, next of kin and legatees, and for necessary expenses, are correct. 2d. That the executor has been charged all interest for moneys received by him and embraced in his account, and for which he is accountable. 3d. That the moneys stated in the account as collected were all that were collectible on the debts stated in the account, at the time of the settlement. 4th. That the allowances for decrease in the value of assets, and the charges for increase in such value, were correctly made. (2 R. S. 34, § 65, 2d ed.) The provision in the decree that the executor pay over the balance found to be in his hands in execution of the trusts of the will is not a payment. It is not a payment so as to discharge him, nor is it a payment so as exonerate the fund distributable and charge the person to whom it is made payable. The decree gives to the distributee a remedy against the executor personally for his proportion of the fund found to be in the hands of the latter. But this remedy is cumulative, and does not impair in the least the remedy against the fund itself. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the claim of the distributee. The theory of the appellant, if it could have effect, would be quite beneficial to himself. He maintains towards the estate a double relation. In his office of administrator *de bonis non* he is the trustee, and as assignees of the interests of William S. and Stephen F., the two superseded executors, he is one of the *cestuis que trust*. If the unpaid balance found to be in their hands for

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distribution and ordered to be distributed by the decree of the 1st of June, 1861, is to be deemed paid, then the moneys of the estate in the hands of the appellant will be relieved and exonerated to that extent, and his interest as assignee of the shares of William S. and Stephen F. will be proportionably enlarged; for he took their interests *cum onere* and subject to whatever might be due from them to the estate. A judgment is a bar to another action for the same cause, but it is not a satisfaction of the claim. It cannot operate to change or impair any other collateral or concurrent remedy. Thus a judgment upon the bond with a mortgage as collateral does not impair the right to foreclose the mortgage at the proper time. And so a judgment upon a covenant to pay rent left the remedy by distress in full force. (*Chipman v. Martin*, 13 *John*. 240.)

The decree of the surrogate should be affirmed with costs. But for greater safety it should also be declared, in the order of affirmance, that the sums of money mentioned in the decree against William S. and Stephen F. Richardson, of the 1st of June, 1861, are to be deemed the undistributed assets of the estate, with leave to any of the parties interested therein to apply to the surrogate at any time hereafter for further directions in regard thereto.

[KINGS GENERAL TERM, February 9, 1863. *Emott, Brown and Lott*, Justices.]



INDEX.

A

ACTION.

1. *When, and by whom, it lies.*
1. A mere contractor, though upon a public work, who is not a public officer, is not liable to third persons, for damages occasioned by the non-performance of the obligations of his contract. *Fish v. Dodge*, 163
2. There is a material and plain distinction between obligations or duties imposed by law—as upon public officers—and those created by contract, merely. In regard to the former, they are created for the benefit of, and are due to, every one who has occasion for, or an interest in, their performance; and hence any one who sustains an injury which is peculiar to himself, by means of their non-performance, or their improper performance, may maintain an action against him who owes the duty, to recover the damages thus sustained. But as to the latter, they rest between the contracting parties alone, and none but parties, or privies, can enforce them, or maintain an action to recover damages for a neglect or refusal to perform them. ib
3. Accordingly *held*, that one who had entered into a contract with the state, to keep a section of the Erie canal in repair, was not liable to an individual who had sustained damages in consequence of his neglecting to perform that duty. ib
4. The principle, *respondent superior*, does not apply to such a case, and affords no shield to the contractor, who is exercising an independent employment under a contract, and is in no sense a servant or agent of any one. ib
5. Neither the contracting board, nor the canal commissioners, can be held to incur any liability for accidents, or injuries to third persons, by reason of the failure of the contractors to perform their contracts. ib
6. Nor is the sovereign, or state, liable in such a case; because negligence in the selection of an agent or servant cannot be imputed against the state. ib
7. False statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact prevent such sales and injure the manufacturers in their business, constitute a cause of action. *Snow v. Judson*, 210
8. It is no defense to an action for such false representations, to allege that the defendant holds a patent giving him the exclusive right to use a particular article which he claims the plaintiff's article resembles; and that the federal courts have exclusive jurisdiction of all causes of action for any violation of that exclusive right. ib
9. No question of patent or no patent, or in respect to any right the defendant may have, under his patent,

or as to any violation of such right, can arise, in such an action, so as to deprive the state courts of jurisdiction. ib

10 The defendant, with others, subscribed a paper by which he agreed to pay \$200 to the trustees or a committee to be appointed by the East Genesee conference of the Methodist Episcopal church, for the purpose of purchasing premises and erecting or procuring a seminary building or buildings and apparatus, to be located in D., and to be under the supervision and control of the East Genesee conference, &c. The subscription contained a provision that the said conference should establish and put in operation a seminary in D., with all reasonable dispatch. It was not to be binding until \$15,000 had been subscribed, nor until said conference should by resolution agree to accept the trust and should nominate and ratify the appointment of trustees or committee to receive and expend the money. The sum of \$15,000 was subscribed. The conference duly accepted the trust reposed, and assumed the responsibility of directing the proposed enterprise, and appointed certain persons the first board of trustees of the institution, and authorized them to organize and obtain a charter. Such trustees were subsequently incorporated, by the regents of the university, under the name of the "Dansville Seminary." Held that by operation of law, as well as by the spirit and meaning of the subscription, the amount subscribed to the paper became due to the literary institution by its corporate name, and that an action upon the subscription paper was well brought in the corporate name of the seminary, without any formal direct assignment thereof from the committee originally appointed by the conference. *Dansville Seminary v. Welch*, 221

11. Where A., owing money for services rendered by B., who is in the employ of C., pays the money to C., for such services, as if the latter were entitled to compensation therefor, instead of B., the receipt of the money by C., under such circumstances, while it does not prejudice B.'s right of recovery against A., if he have any, will not make the

money B.'s, nor entitle him to maintain an action against C. for money had and received by C. from A. for the plaintiff's use and benefit. *Murphy v. Ball*, 282

12. It is not necessary now to commence one action to stay proceedings in another. And where a party has a remedy, which he neglects to apply for until it is too late to obtain the relief he wants, he should not afterwards, without any excuse for his delay in the first instance, be allowed to resort to a new action for that purpose. *Van Fleck v. Clark*, 816

2. Against whom, it lies.

13. When a duty of a judicial nature is imposed upon a public body, they are exempt from responsibility by civil action for the manner in which the duty is performed. But where a duty purely ministerial is violated, or negligently performed, by a public body or officer, an injured party may have redress by action. *Kavanagh v. The City of Brooklyn*, 282

14. Any one furnishing another with a false and fraudulent document purporting to show title in the latter to any property, is liable to any person sustaining damage in consequence of reposing confidence therein. *Per Grover, J. Shotwell v. Mali*, 445

3. Assignability of cause of action.

15. Taking the body of a debtor in execution is the highest form of satisfaction of a judgment. Hence the neglect of a sheriff to arrest the debtor, upon an execution issued against his person, is a wrong to the property, rights or interests of the judgment creditor, which would survive to his executors or administrators, and is therefore assignable. *Dinny v. Fay*, 18

16. Although the courts have always made a distinction, and held that the cause of action does not survive against the executor or administrator of the wrongdoer, unless his estate was benefited by the wrong, yet it seems from the reading of the statute that the cause of action for the same class of actions, precisely, survives alike in favor of the executors and administrators of the injured party, and against the ex-

ecutors and administrators of the wrongdoer. *ib*

17. But whether the distinction is well founded, or not, it is well settled that the wrongdoer is liable himself, to the executor or administrator of the person injured, in an action for a neglect of duty, whether the wrongdoer was benefited by the wrong, or otherwise. *ib*

18. The right of action for an injury done to goods by a person whom a carrier has employed to tow his boat containing them, may be assigned by the carrier to another. *Merrick v. Brainard*, 574

19. A right of action for a tort is assignable, and in an action brought by the assignee, the assignment being, on its face, valid, the defendants have nothing to do with the question of consideration. *ib*

Cause of action. See TRESPASS.

See COMMON CARRIER, 1.
CORPORATION, 3, 5, 6, 86, 87.
FALSE IMPRISONMENT.

AGISTER.

See STATUTES.

AGREEMENT.

1. The plaintiff entered into an agreement with the defendants, by which he agreed to ship and deliver to the defendants a force pump, of the value and for the price of \$60, promising that if the defendants could not make it operate he would make it work, so as to throw water all over the mills of the defendants, or that he would take it away again; the defendants agreeing that if the plaintiff would send them such a pump, on trial, they would try it, at their earliest convenience, or when they could, after which, if they liked it, they would buy it, and pay the plaintiff \$60 for it. *Held* that this was not a sale of the pump, but a conditional agreement by the defendants to purchase it at a future time. *McDonald v. Pierson*, 128
2. *Held, also*, that the defendants were bound to try the pump within a reasonable time; and that they having kept the same in their possession for nearly two years, without making any trial of its sufficiency, or showing any valid excuse for the neglect, the plaintiff was at liberty to treat the condition annexed to the contract as waived, and was entitled to recover the stipulated price of the pump. *ib*
3. *Held, further*, that a trial or experiment of the identical pump was what the agreement required, and no other test was admissible. Hence the opinions of mechanics and experts, who, after examining the pump, had pronounced it insufficient to accomplish the purpose for which it was designed, furnished no excuse to the defendants for omitting to make a trial of the pump. *ib*
4. K., S. & Co., copartners, being indebted to the plaintiffs in the sum of \$8207.75, K., one of the firm, agreed by parol, with the plaintiffs, that in consideration that the latter would receive \$10,000 of the bonds of a rail road company, in payment of such indebtedness of the firm, he, K., would at a future day, at the plaintiff's request, purchase the same bonds of them, and pay them therefor the said sum of \$8207.75. *Held* that the agreement was within the statute of frauds, and void, for the reason that it was not in writing, and no part of the purchase money was paid. *Johnson, J. dissented.* *Heyer v. King*, 200
5. *Held, also*, that the plaintiffs could not recover, upon the contract for the purchase of the bonds, without proof of a tender of the bonds, or of a demand upon the defendant, of performance. *ib*
6. A contract for the sale and delivery of corn, requires that the corn shall be in good condition, and marketable, without any express words to that effect. *Peck v. Armstrong*, 215
7. And when corn delivered in pursuance of such a contract is not good and merchantable, but is damaged, the purchaser has a right to refuse to receive it, and to rescind the contract, and to recover back the money advanced upon it, with interest. *ib*
8. The defendant, having contracted to sell to G. a quantity of corn, de-

livered the same to C., a warehouseman, with G.'s consent, for the purpose of fulfilling his contract, taking from C. receipts stating that he had received the corn of the defendant in store. But C. was not authorized to receive any but merchantable corn, upon the contract, or to waive any substantial defects. *Held* that the receipts were valid and binding contracts, determining conclusively on what account the corn was received, and in what character C. received it. That their legal effect was to retain the title to the corn in the defendant, with the right to withdraw the grain at pleasure, or to make any other appropriation of it. And that such delivery to C. was not to be deemed a receipt of the grain by G. as a fulfillment or on account of the contract. *ib*

9. *Held, also*, that the legal effect of such receipts could not be changed by parol evidence of conversations tending to a different conclusion. *ib*

SEE ACTION.

GUARANTY, 9, 10.

HUSBAND AND WIFE, 1, 2, 7, 8, 9.

AMENDMENT.

See COMPLAINT, 3.

ANIMALS.

1. The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed. *Scribner v. Kelly*, 14
2. It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but the propensity of such animals to do dangerous mischief being inherent and well known, the owner or keeper is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. *ib*
3. To maintain an action for an injury caused by the vicious act of such an

animal, it is not necessary to prove that it occurred through the actual negligence of the owner or keeper; but the negligence upon which his responsibility rests will be presumed. *ib*

4. Where an injury happened to the plaintiff in consequence of his horse taking fright at an elephant passing along the highway in the charge of a keeper, prior to the passage of the act of April 2, 1862, regulating the use of public highways; *Held*, that to render the owners of the animal liable for the damage sustained, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the owners knew or had notice of it. *ib*

ANSWER.

1. The requirement contained in section 149 of the code, that an answer must contain a statement of any new matter constituting a defense, is imperative. Hence if new matter is not set up in the answer, proof of it should be rejected, although such matter would constitute a full defense to the action. *Button v. McCauley*, 413
2. In an action for an injury to property, alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer denying every allegation in the complaint puts in issue the defendant's liability; and it is not necessary to aver that the injury was done by other persons, who were responsible therefor, and not the defendant. *Schular v. Hudson River Rail Road Company*, 658

APPEAL.

1. An appeal without an undertaking is not effectual for any purpose, and is a nullity. It makes no change in the proceedings, but leaves them in the same condition they were in before the notice of appeal was given. *Kelsey v. Campbell*, 288
2. Hence, when the sureties in an undertaking on appeal fail to justify, and the court, upon motion, refuses

them permission to justify, the notice of appeal, with all the proceedings connected therewith, fall to the ground, and the parties are remitted to the same condition they were in before the notice was given. *ib*

8. The appellants are thus left free to perfect a new appeal, with an undertaking which will stay the execution of the judgment. *ib*

ASSESSMENT.

Of premium notes—See INSURANCE (FIRE.)

ASSESSMENTS.

See TAXES AND ASSESSMENTS.

ASSIGNMENT.

Of cause of action—See ACTION, 15 to 19.

Of a mortgage—See GUARANTY, 7.
For the benefit of creditors—See DEBTOR AND CREDITOR.

ATTACHMENT.

1. A motion to set aside an attachment may be made after judgment has been entered. *Thompson v. Culver*, 442
2. Even if such a motion could not be made after judgment, yet if a motion is noticed and actually made in time, but a final hearing and decision thereon is delayed by a reference, until after the entry of the judgment, the order may then be entered. *ib*

See JUDGMENT, 7.

C

CANALS.

See ACTION, 8, 4, 5, 6.

CASES APPROVED AND DISTINGUISHED.

1. The case of *Cazeaux v. Mali*, (25 Barb. 578,) approved. *Shotwell v. Mali*, 445

2. The case of *Cothrel v. Talmage*, (5 Seld. 551,) distinguished from the present case. *Colwell v. Lawrence*, 643

CHARGE TO JURY.

See PROCEEDINGS TO RECOVER POSSESSION OF LANDS.

CHATTEL MORTGAGE.

1. In order to bring the interest of a mortgagor of chattels within the power of an execution, there must be an absolute right of possession for a certain and definite period, at the time the levy is made. *Farrell v. Hildreth*, 178
2. If the time is uncertain or contingent, it cannot be certain or absolute; and if it be contingent and liable to be defeated at any moment, it is not for a definite period. *ib*
3. A provision, in a mortgage, allowing the mortgagee, in case he shall at any time deem himself insecure or unsafe, to take possession of the property and sell it, previous to the time fixed for the payment of the debt, destroys the mortgagor's implied right to remain in possession a moment, provided the mortgagee shall deem himself insecure, and leaves him a mere tenant at sufferance. The nature of his interest is thereby determined to be uncertain and contingent. *ib*
4. And if a sheriff, in such a case, with notice of the mortgage, and after demand of the property by the mortgagee, proceeds to sell the same, on execution against the mortgagor, he renders himself liable to the mortgagee. *ib*

COMMON CARRIER.

1. A carrier can maintain an action in his own name, for an injury done to property intrusted to him to be carried; and in such action he may recover the value, which he will hold in trust for the owner. *Merrick v. Brainard*, 574
2. The owners of a tow boat, undertaking to tow another boat, are, in

the absence of an express contract limiting their liability, bound to exercise ordinary care and diligence, and are liable for the want thereof. *ib*

8. When a carrier of goods employs a tow boat to tow his vessel, and those in charge of the tow boat are guilty of negligence, whereby damage is done to the goods, and the carrier has not excepted in his contract such risks, he is liable to the owners of the goods, for such negligence, on the principle of responsibility for the acts and neglects of his agent. And this liability over to the owners will enable him to maintain an action against the proprietors of the tow boat. *ib*
4. In an action against the owners of a tow boat, for an injury done to the goods they have undertaken to transport, through their negligence, the defendants are not entitled to claim any deduction for so much of the loss as was covered by insurance. *ib*
4. Hence, whether there was, or was not, a vacancy in fact, and if there was, whether it had existed for over one month before the election; and if it had, whether it arose from a cause which authorized it to be filled by the supervisor of the town, is wholly immaterial, in an action against the persons elected, for an act done by them as trustees; because they are not questions which can be traversed in such action. *ib*
5. Matters of that nature can only be traversed in a direct proceeding to set aside or quash the election. Until the election be so set aside or quashed by such a proceeding, the persons claiming to be elected are protected for all acts done by virtue of the office held under color of such election. *ib*
6. When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. *ib*
7. The test of jurisdiction, in such cases, is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong. *ib*
8. Where an individual is present at a special meeting of the inhabitants of a school district, called for the purpose of filling vacancies in the office of trustee, remains silent when the office is being filled as vacant, makes no objection when it is filled, and without objection sees the persons elected enter upon the duties of and assume responsibilities in said office, he himself neglecting to act as trustee, he will be held *estopped* from denying the title of the persons so elected to the office, on the ground that, he himself being a trustee, at the time, there was no vacancy to be filled. *ib*
9. A general non-performance of the duties of an office is a refusal to serve. A refusal to serve may be as strongly and clearly inferred from the acts of an incumbent as from a

COMMON SCHOOLS.

1. Proof of a call by the trustees of a school district, for a special meeting of the inhabitants, for the purpose of filling vacancies in the office of trustee, of the assembling of the inhabitants under that call, the election of two persons as trustees to fill vacancies, and of their acceptance by entering upon the duties of the office, is proof of an election by the competent authority, and constitutes the persons thus elected, *prima facie*, trustees *de jure*. *Colton v. Beardsley*, 29
2. To defeat such *prima facie* title to the office, a party attacking it cannot be allowed to give evidence showing that no vacancy in the office of trustee existed when the persons were chosen. *ib*
8. The authority to call a special meeting to fill a vacancy in the office of trustee being vested in the remaining trustees, and the power to fill it, in the meeting when assembled under such call, the act of the trustees in calling the meeting, and of the meeting in filling the vacancy, are quasi judicial acts; inasmuch as both the trustees and the meeting must first

- direct assertion that he will not discharge the duties of the office. *ib*
10. Thus where a trustee of a school district had not done any business, as such, for some time previous to a special meeting called for the purpose of filling a vacancy in the office, and he attended such meeting and witnessed the election of another as his successor, without making any objection; *Held* that a virtual refusal to serve was clearly shown. *ib*
 11. The certificate of the supervisor is only necessary to effect a change of site; it does not relate to the levying of a tax. *ib*
 12. A school district, having a site on which there had been a building used for school purposes, and such building having been torn down, the inhabitants on the 12th of May, 1857, met and voted to change the site of the school house, and they also, by a separate resolution, voted to raise \$200 to build a new school house. The assessment of the \$200 tax bore date June 8, and the warrant, June 10, 1857, but the levy and sale were not made until 1858, under a renewed warrant. The consent of the supervisor, to a change of site, was obtained June 22, 1857. *Held* that whether the resolution to change the site was legal, or subsequently became so, was immaterial; that the district being without a school house, and owning a site on which a new house could be built, it had the right to raise the money; and that the resolution not designating where the new house should be built, and not being coupled with any other resolution or matter, the court could not say that the money was voted for an illegal purpose. And that in the absence of any express words, it could not infer that the tax was voted to be expended on the new site, when there was a legal site on which it might be expended. *ib*
 13. The insertion of an improper item in a tax warrant issued by the trustees of a school district will not vitiate the warrant, if otherwise valid, or render the trustees liable in trespass. The warrant is void for the excess, only, and the trustees personally liable in an action to recover back any part of such excess paid or collected. But an action to recover the value of the property sold on the warrant cannot be sustained. *ib*
 14. Where a warrant issued for the collection of a second assessment was the same paper that had been used to collect a former assessment, with the exception that the first assessment had been detached from the warrant, the date of the warrant altered, and the second assessment attached to it; and the warrant thus altered was, with the second assessment, delivered to the collector; *Held* that there was nothing in this proceeding that operated to vitiate the warrant; it being, for all practical purposes, and in legal effect, a new warrant. *ib*
 15. When a school district has no site for a school house, the trustees are authorized by the statute to fix one; but when a school house shall have been built or purchased, the site shall not be changed, without the supervisor's consent. In such case two things are requisite, to effect a change; the consent of the supervisor, and the vote of the district; and it matters not which has the precedence. *ib*

COMPLAINT.

1. The court is not empowered, by section 275 of the code, to grant to the plaintiff any relief to which his proof, on the trial, may seem to entitle him, but only such as is consistent with the case made by the complaint and embraced within the issue. *Crownhoven v. The City of Brooklyn*, 9
2. Requisites and validity of a complaint under the title of the revised statutes respecting "Proceedings to compel the determination of claims to real property in certain cases," as amended by subsequent statutes and modified as to the forms of proceeding, by the code. *Hager v. Hager*, 92
3. Where a complaint, in ejectment, alleged that a defendant was in possession claiming in right of his wife, whereas it appeared by the evidence that he was in possession claiming in his own right; *Held* that this was

a variance in no respect material in regard to the merits of the action, so far as the husband was concerned; and that it was a case in which the court might have directed the fact to be found according to the evidence, and ordered an amendment of the complaint, without costs, under section 170 of the code. *Ross v. Bell*, 25

See INSURANCE (FIRE.)
TRESPASS.

COMPTROLLER'S DEED.

1. There can be no vested right in a mere rule of evidence. Nor has the grantee in a deed from the comptroller, of land sold for taxes, while the act of 1850 (*chap. 183*) was in force, any vested right to the benefit of the presumptions in respect to the regularity of the sale and of all the proceedings prior thereto authorized by that statute to be drawn in his favor. *Hickox v. Tallman*, 608
2. Accordingly *held* that it was competent for the legislature, by the act of 1855, (*Laws of 1855, chap. 427*.) to repeal the act of 1850, and thus provide that deeds executed by the comptroller while the latter act was in force should not be thereafter presumptive evidence of the regularity of the proceedings. *ib*
3. *Held also*, that that result had been attained, by the act of 1855, and that there is now no statute relieving grantees of the comptroller under deeds executed prior to 1855, from making proof of every fact necessary to give the comptroller jurisdiction to execute the conveyance. *ib*

CONSULTING ENGINEER.

See CORPORATION, 31.

CONTRACTOR.

See ACTION, 1, 2, 3.

CORPORATION.

1. *Duty and liability of directors, and other officers.*
1. The relation between directors of a corporation and its stockholders, is that of trustee and *cestuis que trust*.

And if the directors pay over the funds in their hands or in the treasury to an individual upon a pretended claim, which they know, or must be presumed to know, is wholly unfounded in law, it is a breach of trust on their part. *Butts v. Wood*, 181

2. Where W., who was secretary and treasurer of a corporation, and also one of the directors, presented a claim to the board of directors for compensation for his services as secretary, which claim was allowed, and ordered to be paid, by the vote of the three directors present, W. himself being one of them, his father another, and a relative the third; *Held* that the transaction challenged the most jealous and severe scrutiny, even if there was legal color for the claim. But that, there being in fact no legal claim, the court was in duty bound to pronounce the disposition of the funds of the company, thus made, fraudulent and void, as against the other stockholders. *ib*
3. *Held, also*, that a stockholder of the corporation could maintain an action in his own behalf and in behalf of the other stockholders, against the three directors, constituting a majority of the board, by whom the resolution was passed, to set aside the transaction, as an abuse of trust, and for the repayment of the money. *ib*
4. The officers of a corporation, authorized to issue certificates to the stockholders, as evidence of title to stock, are liable not only to the immediate purchasers from them of spurious stock, falsely and fraudulently certified by them, but to any subsequent purchaser buying upon the faith of the false certificate, and sustaining damage thereby. *Shotwell v. Mali*, 445
5. Although the purchaser of spurious stock has a remedy against his vendor, for a breach of the implied warranty of title, that right of action does not constitute a bar to an action against one who has induced the purchase, by a fraudulent representation that the vendor had title to the stock, where damage has resulted from the fraud. *ib*
6. The purchaser's right of action against the officers of a corporation

concerned in issuing certificates of spurious stock is complete upon the purchase. And that right will not be affected by any subsequent action of the directors of the corporation, in turning out other property to him, to an amount exceeding the sum paid by him for the false certificates. *ib*

2. *Power of directors.*

7. Where the capital stock of a corporation is limited by its charter, to a certain number of shares, it is not in the power of the board of directors, by any resolution or act of such board, to increase the number of shares beyond that amount. *New York and New Haven Rail Road Company v. Schuyler*, 584

8. Neither can they delegate to their agent, either directly or indirectly, authority to make such increase. Nor will any act of negligence or misconduct, on the part of such agent, effect, by any liability for such acts, what the corporation could not do directly. *ib*

9. Consequently, the doctrine of *estoppel* cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in an answer to a claim to such stock, that the same is void, as being issued in excess of the capital. *ib*

3. *Liability for acts of its agents.*

10. A corporation is liable for the acts of its transfer agents in issuing false certificates, and allowing false transfers, and for negligence on the part of the corporation, and its officers, in permitting transfers of spurious stock to be made on the books of the company, to persons desirous of becoming stockholders therein. *New York and New Haven Rail Road Company v. Schuyler*, 584

11. Permitting its books to be used for the purpose of committing frauds on others who are desirous of purchasing stock; issuing to such persons certificates of stock; and informing buyers who apply for information in regard to stock, before they pay for it, that stock has been transferred on the books, when it has not,

are also acts for which a corporation should be held responsible. *ib*

12. So a corporation is liable to respond in damages for any loss sustained either by the *fraud* or the *negligence* of its officers or agents in discharging the particular duty assigned them; as where a company is bound to keep transfer books for the purpose of transferring stock, and on being applied to by persons about to purchase stock in the company, to know whether shares have been transferred to them, the officers and clerks give the information that shares have been transferred, and also give the certificate thereof; on which statements money is paid; when in fact no money has been paid, and the party making the transfer had no stock to his credit, to dispose of. *ib*

13. A plaintiff is never required to do equity in order to obtain equitable relief, in any other matter than that in which he seeks to obtain it; and then he is to do equity by restoring to the party whatsoever he may have received from him in the transaction sought to be set aside. The rule requiring a party seeking equity, to do equity, does not apply to a case where damages may be recovered for the injury. *ib*

14. Where a corporation has permitted its agents to sell stock covered by certificates when there was stock standing to its credit sufficient to cover such certificates, it is bound to make good such certificates to the extent of any shares owned by the corporation, within the capital stock of the company; and the shares of stock unsold should be applied to the satisfaction of the oldest outstanding certificate of that character. *ib*

15. Persons who have received transfers of spurious stock in a corporation by the acts of its transfer agent, or certificates of spurious stock from such transfer agent, without knowledge or ground of suspicion of fraud or irregularity, and have advanced money thereon, are entitled to recover damages against the company, in a proper action. *ib*

16. Parties who have been misled by the acts or negligence of the officers

- of a corporation, and have advanced money in consequence thereof, are entitled to recover damages against the corporation, in a proper action. *ib*
17. And persons holding certificates of stock, valid when they were issued, accompanied by an assignment and power, on which they have advanced money, may recover damages against the corporation when such certificates have been rendered of no value by the allowance of transfers on the books of the company, without requiring the surrender of the certificates. *ib*
18. In such an action it is not necessary that all the persons holding spurious shares of stock should be made defendants. *ib*
19. Rules for the separation of the stock, in such an action. *ib*
4. *Certificates, and transfers, of stock.*
20. No legal title passes to any one who receives from the owner a certificate of shares of stock, issued by a corporation, with a transfer indorsed thereon, and a power of attorney to transfer the same, even though the person to whom such stock was delivered advanced money on the receipt thereof. But the party receiving the same only acquires an equitable title, valid against the party named in the certificate, to compel a transfer of such shares on the books of the company, while the same remains in his name thereon. *New York and New Haven Rail Road Company v. Schuyler, 534*
21. By the law and by the statute of Connecticut, passed in 1849, such an assignment is not valid against any but those making it and their representatives; and such law operates upon all transfers of the stock of the company, whether made in Connecticut or New York. *ib*
22. A transfer on the books of the company, for value, to a *bona fide* holder, will pass to him the shares so transferred, although at the time the transferrer had a certificate in his name outstanding for the same, which he did not surrender at the time of the transfer. *ib*
23. The fact that the owner has pledged the certificate to a third party, as security for money borrowed, without notice to the company thereof, will not affect such transfer, or the title of the transferee, to the stock so transferred. *ib*
24. A transfer by a person who, at the time, holds no shares on the books of the company, passes no title to any shares of stock in the company. *ib*
25. Such a transfer conveys no title to stock subsequently acquired, and cannot be made good by a transfer to the person making the same, of subsequently acquired stock. *ib*
26. Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfer may be such as to make the transfer by the transferrer appear earlier than the transfer to him; unless it is proven that such transfer was made prior to the one by which the stock was assigned to the transferrer. *ib*
27. The by-laws of a corporation, requiring a surrender of the certificate before making a transfer, are not binding on third persons, so as to affect their rights, or deprive them of their property. *ib*
28. Where stock is transferred under a power of attorney attached to a certificate, which power also contains an assignment of the shares, and authority to transfer such shares, the power will not authorize the transfer of any share acquired after the date of the power. *ib*
29. Such transfer can only operate to transfer stock held by the person named in the certificate and power, at the date of the power; and if such stock was previously transferred by him, no title will pass, under the transfer of the attorney, to any stock subsequently acquired by such person. *ib*
30. In the case of a certificate and power of attorney held by the party to whom it has been pledged, without making a transfer on the books of the company, the same rule

should be applied. Such certificate and power will give to the holder an equitable title to any valid stock held by the person named therein, at the date of the power, if he continues to hold such stock; but if all the stock held by the party at the date thereof has been sold by him, then the certificate has ceased to be of any value, and should be canceled. cb

5. Liability of stockholders, for debts.

81. A consulting engineer, who renders services as such, is not within the language, or the policy or reason, of the 10th section of the act of April 11, 1849, incorporating the New York and Liverpool United States Mail Steamship Company, which provides that the stockholders shall be individually liable for debts due and owing to their "*laborers and operatives*" for services performed for the corporation. *Ericsson v. Brown*, 890

82. Stockholders in a manufacturing corporation are not bound by the acts or declarations of the foreman of the company; he not being in any respect their agent. *Strong v. Wheaton*, 616

83. A judgment recovered against a manufacturing corporation, by an employee, is not even *prima facie* evidence of the amount which the plaintiff therein is entitled to recover in a subsequent action brought by him against stockholders, for work and labor. cb

84. To entitle the plaintiff to recover in such an action he is bound to prove not only the existence of the corporation, the recovery of a judgment against it, the issuing and return of an execution unsatisfied in whole or in part, but the performance of labor to some amount, and that the defendants were stockholders. cb

85. Persons signing the articles of association of a manufacturing company are stockholders; and when the holding of stock is once established it must be presumed to continue, until its surrender or assignment is shown. cb

86. The word "obligation," as used in section 120 of the code, which declares that persons severally liable on the same *obligation* or instrument, &c., may all or any of them be included in the same action at the option of the plaintiff, should be confined to its legal meaning. It does not embrace a class of actions not evidenced by a writing. cb

87. Accordingly *held* that an action for work and labor could not be maintained against two stockholders of a corporation, by an employee of the company, without bringing in the other stockholders. cb

COSTS.

1. Where a non-resident party gives security for costs on commencing the action and on bringing an appeal, the costs are not payable and cannot be collected until the appeal is decided. And the defendant should not be allowed to sue on the bond given as security for costs, to recover moneys which he is not permitted to collect directly, by execution. *Van Vleet v. Clark*, 816

2. But if an action is brought upon the bond, in another court, before the appeal is decided, the plaintiff in the original suit may move for an order in that suit, staying the second action until the decision of the appeal. If, instead of doing this, he defends the action brought upon the bond and a decision is made against him there, he cannot seek the aid of the court in the original action by injunction. cb

COUNTY CLERK.

See DEED.

D

DAMAGES.

1. Amount of.

1. Where, in an action to recover the price of wheat delivered under a contract, at a price fixed, the defendant sets up by way of counter-

claim, the damages he has sustained by reason of the plaintiff's refusal to deliver the whole quantity agreed upon, he is, if he establishes such defense, entitled to be allowed as damages, the difference between the contract price of the wheat not delivered, and the market value thereof, at the time it was to have been delivered, with interest on that difference. *Fishell v. Winans*, 228

2. Whether liquidated, or not.

2. Where a contract for doing a piece of work in building a vessel, contained a stipulation for the completion of the work on or before a specified time "under a forfeiture of one hundred dollars per day for each and every day, after the above date, until the same is completed." Held that the sum specified was not to be deemed liquidated damages. *Cotwell v. Lawrence*, 648

3. Where the contract is of such a character that it can be separated, as to performance, so as to admit of an assessment of damages for a breach of one part, and not the other, the party should not, for a trifling omission, be made responsible for the whole amount of damages specified. *ib*

Evidence in mitigation—See SHERIFF.

DEBTOR AND CREDITOR.

1. Assignments for the benefit of creditors.

1. Where an assignment for the benefit of creditors conveyed to the assignee all the "goods, chattels, merchandise, &c., and property of every name and nature whatsoever," of the assignor; Held that these words were sufficient to include all the property of the assignor, wherever it might be, whether on land or at sea, and embraced saws ordered by the assignor to be manufactured for him in England, which were on their voyage to this country at the date of the assignment. *Van Dine v. Willett*, 819

2. And the assignee having elected to accept the goods, as was evidenced by his paying the duties, and the

purchase money; Held that the interest of the assignor in the property was at an end, from that time, and the title was in the assignee. And that a sheriff levying upon and taking the property, after that, as the property of the assignor, was a trespasser. *ib*

3. A direction, in an assignment, to the assignee to pay the rent, taxes and assessments on the real estate until the same shall be sold, is a power necessary to the preservation of the property, and one which the assignee would be authorized to exercise, if it were not included in the assignment. *ib*

4. A provision, in an assignment, authorizing the payment of debts, bonds, notes and sums of money due and to grow due from the assignor to the assignee, cannot be made to cover debts not then in existence, and will not, therefore, invalidate the assignment. *ib*

5. Nor will the authority to the assignee to employ an attorney render an assignment invalid. *ib*

6. An action may be brought by preferred creditors in an assignment for the benefit of creditors, in behalf of themselves and other creditors of the assignor, against the assignee, for an accounting, and to obtain a judgment that the defendant close up his trust by converting the property into money and distributing the same under the assignment; where the creditors are so numerous that it would be impracticable for the plaintiffs to bring them all before the court. *Brooks v. Peck*, 519

7. Where the right to have the assigned property converted into cash is common to all the creditors, the only question being as to the time when it shall be done, there is no antagonism between them. *ib*

8. A mere difference of opinion, among the creditors, as to the best time for disposing of the assigned property, does not constitute a hostility of interest. *ib*

9. Where assigned property consisted in part of real estate, occupied as a ship yard, which the extension of

an avenue had rendered unsuitable for that purpose, and the property was not likely to be purchased by any one for that use, but it was suitable for other purposes; there being no present prospect of a rise in value, and the creditors not all agreeing to allow the assignee further to continue his efforts to sell the property at private sale; *Held* that it was a proper case for directing the assignee to sell the property at public auction, if not sooner sold at private sale. ib

See PARTNERSHIP.

DEED.

It is the duty of the county clerk to record the memorandum of alterations and interlineations in a deed; and it is not erroneous in a judge to charge the jury that the absence of any such memorandum, in the record, is a circumstance for their consideration in connection with the question of an alleged fraudulent insertion in the deed. *Hager v. Hager*, 92

See DETERMINATION OF CLAIMS TO LAND.
FRAUD.

DETERMINATION OF CLAIMS TO LAND.

1. In an action to compel the determination of claims to real property, proof that the premises in question were assessed to the plaintiff, as owner, is admissible, as tending to show a claim thereto on his part, somewhat open and notorious, and to give practical character to his assertion of title. *Hager v. Hager*, 92

2. In such an action it is not erroneous to charge the jury that in case they find the plaintiff has no title to the premises, and they for that reason find for the defendant, they may proceed one step further, and determine whether the defendant has title to the whole, or to any and what portion thereof. ib

3. Nor is it erroneous to charge that the non-production of a deed (alleged to contain a material clause fraudulently inserted) in the de-

fendant's possession, and purposely suppressed by him, and containing evidence bearing strongly on the question of fraudulent insertion, is a circumstance from which they may pronounce against the defendant, as to that clause. ib

E

EASEMENT.

1. A covenant or agreement restricting the use of any lands or tenements in favor or on account of other lands, creates an easement, and makes one tenement servient and the other dominant; and this without regard to any privity or connection of title or estate in the two parcels, or their owners. *Gibert v. Peteler*, 488

2. All that is necessary is a clear manifestation of the intention of the person who is the source of title, to subject one parcel of land to a restriction in its use, for the benefit of another, whether that other belong, at the time, to himself or to third persons, and sufficient language to make that restriction perpetual. ib

EJECTMENT.

1. Ejectment cannot be sustained against a municipal corporation by proof that at the commencement of the action the *locus in quo* was in use by the public as one of the public streets of a city; such use being inconsistent with actual occupancy by the corporation, and not affording evidence of any claim by it that it owns or has any interest in the premises. *Consenthoven v. The City of Brooklyn*, 9

2. The grading, paving and cleaning of the street are acts necessary for the fair enjoyment of the public right of way; and may be regarded as showing that the corporation claimed an easement for the public upon the land; but cannot be considered evidence that it claimed any title to, or interest in, the land itself. ib

ELECTION.

See INSURANCE COMPANIES, 1, 2, 3.

EQUITY.

See INFANTS.

ESTOPPEL.

1. No one can be estopped from refusing to do an illegal act; but an estoppel can only operate in favor of a party injured, where there is no provision of law forbidding the party against whom the estoppel is to operate from doing the act which is sought to be carried out through its operation. *New York and New Haven Rail Road Company v. Schwyler*, 534
2. The doctrine of estoppel is only available to the party for whom it was designed, and does not operate in favor of a stranger to whom the representation was not made. *ib*

See COMMON SCHOOLS, 8.

EVIDENCE.

1. Proof that an individual is reputed to be, and has acted, notoriously, as a public officer, is *prima facie* evidence of his official character, without producing his appointment. *Colton v. Beardsley*, 29
2. This exception to the general rule requiring the best evidence to be given, is founded upon the strong presumption that arises from the exercise of a public office, that the appointment to it is valid; and is made for the reason that it would be attended with general inconvenience to require full and strict proof of the appointment or election of public officers. *ib*
3. In an action against a person for an act which he had no right to do unless an officer, he must show that he was *prima facie* an officer *de jure*. Proof of acting as such under color of authority, and of reputation, is admissible evidence for that purpose; and if proved, is sufficient, in a collateral proceeding, to establish that character. *POTTER, J. dissented.* *ib*
4. The uniform practice of the courts has been to admit proof that officers

have been reputed to be and have acted as such, in cases where they have been sued for their official acts and have sought to justify their acts as incumbents of the office. *Per ROSEKRANS, J.* *ib*

5. It is competent for the legislature to change the burthen of proof, in a given case, from one party, and cast it upon another; no rule of evidence at common law being changed. *Hickox v. Tallman*, 608

See COMMON SCHOOLS, 1, 2.

EXPERT.

JUDGMENT, 1.

PRIVILEGED COMMUNICATIONS.

EXECUTION.

The necessary wearing apparel of every debtor is exempt from levy and sale on execution. *Bumpus v. Maynard*, 628

See SHERIFF.

EXECUTORS AND ADMINISTRATORS.

1. Where the domicile of a testator is in this state, and his will is proved and letters testamentary issued here, where all the personal estate is situated, it is unnecessary for the executor to prove the will in another state, where the real estate of the testator is situated; and he will not be allowed the expenses incurred in doing so, on the settlement of his accounts. *Young v. Brush*, 294
2. The distribution of the personal estate, in such a case, is to be according to the laws of New York; and a decree of a court in the state where the real estate is situated, directing the expenses of proving the will there to be paid out of the estate has no force or validity here; and cannot make those expenses chargeable to the legatees under the will, in this state. *ib*
3. Under ordinary circumstances, where a party *refuses* to pay over moneys held by him in a fiduciary character, he should be charged with interest; and the fact of its being deposited for safe keeping, in a bank or trust company, does not relieve

the trustee from such liability; even though he receives a smaller rate of interest. *ib*

4. But where money was deposited by executors, in a trust company, under the direction of a referee, and with the consent of the counsel of the opposite party, as to the place of deposit, to be applied to the payment of any recovery in the action; it was *held* that, in the absence of any demand of the payment of the money, the executors were not chargeable with a higher rate of interest than was received for the fund while it was deposited in the trust company. *ib*

5. Upon a settlement of the accounts of an administrator *de bonis non*, with the will annexed, before the surrogate, legatees should not be charged with the sums decreed by the surrogate to be paid to them, respectively, upon the final settlement of the accounts of superseded executors, but only with the advances charged to them in the will, and the money actually received by them from the estate. *Clapp v. Meserole*, 661

6. A decree of the surrogate, ascertaining the amount of money in the hands of executors for distribution, and directing in what manner it shall be distributed, is not a satisfaction or extinguishment of the claims of those to whom the money is made payable, to the extent of such amounts, respectively. *ib*

7. A provision in such a decree, directing the executor to pay over the balance found to be in his hands, in execution of the trusts of the will, is not a payment, so as to discharge him; nor is it a payment, so as to exonerate the fund distributable and charge the person to whom it is made payable. *ib*

8. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the claim of the distributee. *ib*

9. Though the decree of the surrogate gives to each distributee a remedy against the executor personally, for his proportion of the fund found to

be in the hands of the executor, this is only cumulative, and will not impair the remedy against the fund itself. *ib*

See ACTION, 16, 17.
WITNESS, 2.

EXEMPTION.

See EXECUTION.

EXPERT.

The testimony of an expert is admissible to explain technical terms in a contract; also to explain the meaning of provisions used in a specification for building steam engines. *Colwell v. Lawrence*, 643

F

FALSE IMPRISONMENT.

1. Where one makes a complaint before a police magistrate on a subject matter over which the magistrate has a general jurisdiction, and the magistrate thereupon issues a warrant, upon which the party complained of is arrested, the complainant is not liable, in an action for false imprisonment, although the facts stated in the complaint do not constitute a criminal offense, so as to give the magistrate authority to act in the particular case. *Von Latham v. Libby*, 839

2. Where a party applying to a magistrate, having general jurisdiction of the subject matter, for a warrant of arrest, under the act of April 18, 1857, "to punish nuisances and malicious trespasses on lands," does no more than to state his case to the magistrate, in an affidavit, without bad faith or malice, he is not liable for the consequent action of the magistrate, even though it be erroneous. *ib*

FORECLOSURE SUIT.

In an action for foreclosure, commenced previous to the amendment

of the 182d section of the code, in 1862, a grantee of land was not charged with constructive notice of the commencement of the suit, although a *lis pendens* had been filed, unless the summons had been served on his grantor before the conveyance of the land. *Butler v. Tomlinson*, 641

FOREIGN CORPORATION.

1. A foreign corporation, migrating to this state and carrying on its business here, exclusively, and ceasing to transact any business in the state of its creation, loses its corporate rights and privileges, and becomes, as to all persons dealing with it, a mere partnership. *Merrick v. Brainerd*, 574
2. A stockholder in such a corporation is liable as a partner, in the association or partnership which the stockholders become, on the termination of the corporation. *Morgan, J. dissented*. 5b

FRAUD.

1. When a party receives a conveyance of land or other property from an insolvent, without actually paying, securing or becoming bound to pay any consideration therefor, no further proof of knowledge or notice of the fraudulent intent of the grantor against his creditors is necessary in order to charge the grantee with complicity in the fraud. *Wood v. Hunt*. 802
2. The subsequent voluntary payment by the grantee, of valid debts existing against the grantor, or the purchase of obligations against him, or even the payment of some money, subsequently, to the grantor, will not create a presumption in favor of the good faith of the grantee, or sustain the validity of the conveyance. 5b
3. Nor does the grantee, by such evidence alone, present a case which entitles him to demand, as a condition to the granting of relief to the creditors of such a grantor by adjudging it void and directing a sale of the premises, and the satisfaction of a judgment creditor from the pro-

ceeds of the sale, that any provision shall be made for the indemnity of the grantee for sums which he has voluntarily paid to parties having demands against the grantor. 5b

4. The complicity of the grantee in the fraud of the grantor deprives him of any right to relief in respect to such payments, from a court of equity. 5b
5. A grantee of a well known insolvent, who cannot show that he paid some present consideration at the time of the conveyance, or that he then secured, or undertook by some promise, to pay in future, cannot claim to be ignorant of the fraudulent intent of the grantor against his creditors. 5b

See CORPORATION, 10 to 19.
JUDGMENT, 6.

FRAUDS, STATUTE OF.

See AGREEMENT, 4.

G

GRANT.

When the state makes a grant of land covered with the waters of a bay or navigable river, and the grantee reclaims and raises it above the surface of the water, in the form of a wharf, it is not a mere *franchise* to collect wharfage, and belonging to the public at large for commercial purposes, but the grantee is invested with all the rights that pertain to the ownership of lands. *People v. Kelsey*, 269

See FRAUD.
NEW YORK (CITY OF), 1, 2, 3.

GUARANTY.

1. A guaranty of collection implies that a note or evidence of debt is good, or good and collectible against the principal debtors; and this means collectible by due course of law. *Cady v. Sheldon*, 103

2. Ordinarily, to test that question, it is necessary that the customary legal proceedings should be resorted to, viz. a judgment and execution against the parties primarily liable to pay; and the return of an execution unsatisfied is *prima facie* sufficient and satisfactory evidence that it is not collectible. *ib*
3. Yet it is not absolutely *indispensable* that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings would be entirely ineffectual. Proof that the principal debtors, from the period of the maturity of the debt, have been uniformly insolvent and unable to pay any part of the debt, is satisfactory and sufficient evidence that legal proceedings would be unavailable to collect the note. *ib*
4. Legal proceedings are not absolutely a condition *precedent* to the liability of the guarantor; but equivalent evidence of the inability to collect any part of the debt will suffice. *ib*
5. In an action upon an instrument guarantying the collection of a bond, the referee having found, upon evidence warranting such a conclusion, that the principal debtors were severally insolvent and unable to pay any part of the bond; *Held* that after such a finding the court might well conclude that a suit against them would be utterly nugatory, and therefore unnecessary to be brought as a condition precedent to the liability of the guarantors. *ib*
6. When a mortgage is given, as collateral to the bond guarantied, it is not indispensable that the holders of the bond should seek satisfaction out of the mortgaged premises, by a foreclosure, if it appears that a resort to that remedy would have proved fruitless, in consequence of the sale of the mortgaged premises under a statute foreclosure, to satisfy a prior mortgage, at a price leaving no surplus. *ib*
7. Where a mortgagee assigns the mortgage, and the bond accompanying the same, to another, covenanting in the assignment that they shall be paid when due, a subsequent holder of the bond, to whom the same has been assigned, with a guaranty of payment, must first attempt the collection of the debt, from the obligee and mortgagee, before he can resort to the guarantors, upon their guaranty. *ib*
8. Such a covenant is an absolute *guaranty* of payment, entitling the assignee to prosecute the assignor thereon immediately after default in payment of the amount due upon the bond and mortgage; and the benefit thereof will pass to a subsequent assignee, under an assignment of the securities, executed by the covenantor. *ib*
9. Where the holder of a note made by a third person turns it out in payment of his own debt, or in payment for property purchased, or for money received by him, from the person to whom he transfers it, and at the same time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking, in substance, entirely for his own benefit and advantage, and the contract is valid even though it rest entirely in parol; and is not within the statute of frauds. *Dauber v. Blackney*, 432
10. And if valid by parol, such an undertaking will be none the less valid because reduced to writing, without expressing the consideration. *ib*

H

HUSBAND AND WIFE.

1. A married woman, living with her husband, and having no separate estate, cannot, in the absence of her husband, and without his knowledge or consent, enter into an agreement in writing, for the purchase of real estate on credit. *Ross v. Bell*, 25
2. Such an agreement is a mere nullity; conferring no rights, and imposing no obligations upon either party. *ib*
3. Hence, the possession of the premises is, in law, the possession of the

husband, and in no respect that of the wife. She is therefore improperly joined with her husband in an action by the vendor, to recover the possession of the premises for a default in the payment of the purchase money. *ib*

4. Where land was purchased for a married woman, as a homestead, with her separate means, and she went into possession and made valuable improvements thereon with her own separate funds; *Held* that the arrangement between the wife and her husband in respect to such purchase, being without any fraudulent intent, was lawful, and should be sustained. *Damon v. Hall*, 136

5. And that notwithstanding the conveyance of the property so purchased was, by mistake, made to the husband, instead of the wife, her equity was superior to that of a creditor of the husband whose debt matured, and whose judgment was recovered, long after the title to the property had passed from the husband and wife, by conveyances to bona fide purchasers. *ib*

6. Judgments recovered against husband and wife during coverture and for a cause of action accruing after marriage, will not bind the wife's separate estate. *Tisdale v. Jones*, 523

7. A contract entered into between husband and wife, before marriage, although void at law, will be recognized and enforced in equity. *ib*

8. Although an ante-nuptial agreement still rests in covenant, equity will enforce it; treating as done that which the husband agreed to do; and this even against creditors and purchasers. *ib*

9. By an agreement executed prior to marriage, and in contemplation thereof, the husband, for himself and his heirs, covenanted with a trustee of the wife that if the marriage should take place, he and his wife would convey, settle and assure certain premises, the separate estate of the wife, to the trustee, for the use and behoof of the wife for and during her life; and if she should die leaving heirs of her body, then the premises should go to the

use of the husband for life, and then to the heirs of the wife's body. If the wife should die within ten years without heirs of her body living at her death, then one half of the premises should go to the husband, and the other half to the wife's collateral relatives. But if the wife should not die, and should not have heirs of her body living, within ten years, and the husband should survive, then the whole premises should go to him for life, remainder to the wife's heirs. No conveyance pursuant to this covenant was ever executed. A judgment being recovered against husband and wife, for work and labor done upon the separate estate, the premises were sold by the sheriff upon an execution issued thereon. *Held* that in equity the husband had no equitable interest in the premises, although there was an apparent legal interest in him. And that it was in the power of the court to control the judgment, so as to protect the interests of the wife against the husband and all others claiming under him, with notice of the wife's rights. *ib*

10. *Held, also*, that the title of the husband being *prima facie* valid, a sale of the premises upon an execution issued on the judgment, followed by the sheriff's certificate of sale, transferred to the purchaser an apparently valid title, to protect herself against which the wife must commence an action and establish the ante-nuptial agreement. That this created a *cloud on the wife's title*, which a court of equity would interfere to remove. *ib*

See COMPLAINT, 8.
WITNESS, 4.

I

INDORSEMENT.

See PROMISSORY NOTES.

INFANT.

1. Courts of equity have inherent jurisdiction, independently of statute, to order a sale of the *equitable estates* of infants. *Wood v. Mather*, 478

2. The statute of New York, providing for the sale, &c. of the real estate of infants by chancery, apply only to cases in which the legal title is in the infants. *ib*
3. In a proceeding in equity for the sale of the equitable estates of infants in lands, such equitable estates may be transferred from the infants by a written contract of sale, or by a parol contract of sale followed by payment, possession, and improvements made by the purchaser, where the sale was made by the guardian of the infants under the sanction of the court. *ib*
4. The equitable title thus acquired constitutes a good defense for the purchaser, in an action of ejectment, when properly set up in his answer, as against the infants after they have arrived at full age. *ib*
5. An adult co-tenant who joins in a petition praying a court of equity to order a sale of the land held by the adult and infant in co-tenancy, is bound by the order made pursuant to his request. *ib*

INJUNCTION.

See Costs, 2.
NEW YORK (CITY OF), 2, 3.

INSURANCE (FIRE.)

1. An assessment made upon a premium note, should be made without reference to a former assessment standing in force against the maker of the note, and as to which the assessing power of the insurance company is expended. If it includes such former assessment it will be irregular. *Campbell v. Adams*, 132
2. The surrender of a policy by the insured, and its cancellation by the insurance company, dissolves the relation of the insured as a member of the company, and the company has no further claims upon him, except for the unpaid assessments previously made. *ib*
3. The premium note is part and parcel of the contract of insurance, and, with the policy, constitutes the whole of the transaction. One part cannot be canceled and the other remain in full force, without the consent of both parties. *ib*
4. It is well settled that at the common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. *Freeman v. Fulton Fire Insurance Company*, 247
5. Hence a complaint, in an action on the policy, must contain an averment of such an interest in the plaintiff, or in the person for whose benefit the contract was made, in order to state a cause of action. *ib*
6. Where the person with whom a contract of insurance was made, and who brings an action upon it, has no interest in the property which would authorize or enable him to make such a contract himself, he is bound to state affirmatively, in his complaint, that he acted as the agent of another, whose interest was sufficient to sustain such a contract. *ib*
7. A policy of insurance invalidated by reason of a neglect to give notice of other insurances, may be revived and rendered binding by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding, and with a full knowledge of, the forfeiture. *Carroll v. Charter Oak Ins. Co.* 402
8. Notwithstanding an express provision in a policy that none of its conditions "can be waived, except in writing signed by the secretary," it is competent for the parties to rescind or modify that provision, by a valid agreement even in parol; and an executed agreement to renew a forfeited policy clearly will have that effect. *ib*
9. The only interest which passes by an assignment of a policy after a loss has occurred, and after the insurers have been served with notice thereof and with the preliminary proofs, is the claim or debt which the insured holds against the insurers for the amount of the loss. *ib*
10. Hence, such an assignment is not a breach of a condition in the policy

that the interest of the assured, in the policy, is not assignable unless by the written consent of the insurers; and that in case of any transfer or termination of such interest without such consent, the policy shall from thenceforth be void. *ib*

11. *It seems* that a provision, in a policy, prohibiting a transfer of the interest of the assured *after* loss, would be illegal and void. *ib*

12. A policy of insurance is not rendered absolutely void by the omission of the assured to specify in his application, all the buildings within ten rods of the insured property, but it is merely *voidable* at the election of the company. *GROVER, J* dissented. *Huntley v. Perry*, 569

13. After the company has chosen to assert the validity of the policy, by bringing an action upon the premium note, to recover an assessment, the insured cannot be permitted to set up the falsity of his own statements, in the application, as a defense. *ib*

INSURANCE COMPANIES.

1. An insurance company was incorporated under the general law. By the 7th section of its charter it was provided that "the rights, powers and privileges now or hereafter conferred by law on this company, are hereby vested in and shall be exercised by a board of directors, to consist of forty persons." Subsequently the legislature passed an act which provided as follows: "The Excelsior Insurance Company is hereby authorized to reduce the number of its directors to twenty-one, instead of forty, as provided by its charter." *Held*, that in the absence of any provision in the act requiring the act of reduction to be done by the stockholders, at a meeting for that purpose, the power rested in the board of directors. *CLERKE, J.* dissented. *Matter of the Excelsior Ins. Co.* 297

2. *Held, also*, that an election of directors could not be set aside as void and a new election ordered, on the ground that there had been no pre-

vious action taken by the stockholders to reduce the number of directors. *ib*

3. *Held, further*, that the neglect or refusal of the stockholders, at such election, to vote for the whole number, did not make the election illegal. Such as had a majority of the votes were elected; and if there were vacancies left in the board of directors, in consequence of the omission to elect the whole number, the board had power, under the 8th section of the charter, to fill them, but not to hold a special election for that purpose. *ib*

4. Premium notes, taken by a mutual insurance company, upon policies already issued, and payable not at the end of or within twelve months from date, but in such portions and at such times as the directors shall require, are not sufficient to constitute a basis of capital for the renewal or extension of the corporation under the act of 1849. (*Laws of 1849, chap. 308.*) *The People ex rel. Barton v. The Rensselaer Insurance Company*, 323

5. It will not be *presumed* that notes in that form were contributed and designed for the purpose of constituting a basis of capital, but such intention must be *proved* by satisfactory evidence. *ib*

6. The use of such notes by the directors for the purpose of extending the charter of the company, under the act of 1849, being radically different from the purpose for which they were originally given, and for which they were intended to be used, it is an unjustifiable *diversion* of the notes, which will constitute a defense on the part of the makers to their enforcement, if attempted without the occurrence of any assessment; unless a consent was given to such diversion. *ib*

7. The certificate of the comptroller, specified in the 11th section of the act of 1849, confers upon the company only an apparent and *prima facie* right to enter upon the business of insurance. It was not intended and has not the effect to commit the state, by an official and conclusive admission on its part that

- the company is absolutely entitled to the exercise of corporate privileges for thirty years; and was not designed to be a bar to an action in the name of the people brought for a dissolution of the company for non-compliance with the conditions precedent to its valid incorporation. *ib*
8. An act of the legislature, authorizing a fire insurance company, on certain conditions, to take marine risks, is not a legislative recognition of the valid incorporation of the company, under the act of 1849. *ib*
9. The appointment of a receiver of an insurance company, by the court, and the consequent partial assumption and control by the court of the affairs and funds of the company, is not a judicial recognition of the due incorporation of the company, or an estoppel upon proceedings for a violation of the law of its existence. *ib*
10. Notwithstanding a receiver of an insurance company has been appointed, on account of its alleged insolvency, the corporation is to be deemed *acting* as a corporation, for the purpose of authorizing an action to be brought against it, under the 8d subdivision of section 482 of the code. *ib*
11. If a corporation does not comply with the fundamental requisites of the act creating it, it *offends* against its provisions and is liable to an action, under section 480 of the code, for the purpose of vacating the charter or annulling the existence of the corporation. *ib*
12. When a judgment is pronounced against an insurance company, adjudging it to have no legal existence, and directing its charter to be vacated, the receiver of the corporation will be prohibited from bringing any new suits; yet the court will not, in such action, interfere with suits already instituted and in progress; but will leave the parties in such suits to apply therein for a stay of proceedings or other relief. *ib*
13. When an insurance company accepts from the assured the premium for a renewal, and renews the insurance, it will be deemed to have declared the contract of insurance to be valid, and to have waived the forfeiture, if any has occurred by reason of the omission of the insured to give notice of other insurances and have them indorsed on the policy. *Carroll v. The Charter Oak Insurance Company*, 402
14. Under such circumstances, the company is precluded from asserting either that the renewal was inoperative, or that the policy became void immediately after it was renewed, by reason of circumstances of which it was fully cognizant at the time of renewal, on the principle of estoppel *in pais*. *Johnson, P. J.* dissented. *ib*
15. There is a wide distinction between the liabilities of those who give notes to form the capital stock of a mutual insurance company and of those who give notes for premiums, after the stock is made up and the company brought into existence. While the former class are liable on their notes, irrespective of losses, the latter are liable only for the *pro rata* share of such losses, in common with all other available premium notes held by the company. *Dana v. Munro*, 528
16. An individual taking a policy of insurance and giving his promissory note to the company, for the premium, cannot be made a stockholder, and liable for the full amount of the note, when he neither knows that he is assuming any such obligation, nor intends to assume it. *ib*
17. The agent of an insurance company about to be organized applied to the defendant's agent to insure the buildings of the defendant in the company, when it should be in a situation to do business; saying that it was not yet organized, but soon would be. Subsequently, after the company was authorized to receive applications, the request to insure was renewed, and acceded to by the defendant, who made an application, and gave a note for the premium; without any intimation being given that any obligation was sought or intended other than that incurred by every person insuring in a mutual insurance company. *Held* that the

note could not be treated as a stock note, and collected without any assessment. *ib*

INTEREST.

See DAMAGES.

EXECUTORS AND ADMINISTRATORS,
8, 4.

LEX LOCI CONTRACTUS.

J

JUDGMENT.

1. Where, in an action upon a judgment, the defendant, by his answer, puts in issue the existence of a regular, valid and legal judgment, any evidence tending to show the judgment illegal or void, is competent. Hence a certified copy of the judgment record, showing that since the joining of the issue the judgment has been vacated, is admissible. *Kinsey v. Ford*, 195
2. Requisites and sufficiency of the statement of indebtedness upon which to enter a judgment by confession. *McDowell v. Daniels*, 148
3. It was not the object of the statute requiring such statement, to compel the debtor to state enough of the transaction out of which the indebtedness arose to enable other creditors to form an opinion, *from the facts stated*, as to the integrity of the debtor, in confessing the judgment; but to require him to state enough of the facts to enable creditors to inquire into the transaction, and to form an opinion of the honesty of the judgment, from the facts *they shall ascertain*. *ib*
4. A statement alleging that the judgment is for "cash loaned to defendant for his use in the year 1854, and there is unpaid on said loan one thousand and seventy dollars," is insufficient. *ib*
5. A statement alleging that the judgment is for cash loaned the defendant, and paid for his use and at his request, and interest thereon; stating various sums or items with sufficient particularity as to time, making up the sum for which judgment is confessed; but not stating which items or sums were loaned to the defendant, and which were paid for his use; and not distinguishing at all between the sums loaned to the defendant and the sums paid for his use; nor stating to whom any item or sum was paid for the use of the defendant, is insufficient. *ib*
6. Judgments by confession, entered on insufficient statements, being by the statute pronounced void, as to other judgment creditors, cannot be supported by affidavits, on a motion to set them aside for irregularity. *ib*
7. An attaching creditor, who has not yet recovered a judgment, is not within the class of persons who can impeach the *bona fides* of a judgment confessed by the debtor, to a third person, before the levying of the attachment. That can only be done by a judgment creditor. *Bentley v. Goodwin*, 638
8. A judgment declaring a conveyance fraudulent and void as against creditors directed the premises to be sold, and that out of the proceeds the plaintiffs' judgments be satisfied; that the surplus, if any, be deposited in the trust company; and in case of a deficiency on the sale, that the defendant account for the rents and profits of the premises. *Held* that the judgment was erroneous in directing a sale of the premises to take place before the accounting; that provision rendering the judgment interlocutory, and preventing an appeal by the defendant and a stay of proceedings until after the premises should have been sold. *Wood v. Hunt*, 802
9. *Held, also*, that the judgment was erroneous in directing the surplus proceeds of the sale to be deposited in the trust company, instead of directing them to be paid over to the defendant. *ib*

See CORPORATION, 88, 84.

HUSBAND AND WIFE, 5, 6.

VENDOR AND PURCHASER, 5.

JURISDICTION.

1. The constitution of 1846 and the code of procedure have by necessary

implication abolished every limitation in respect to the amount in controversy theretofore required to give jurisdiction, in actions of an equitable nature entertained only in the court of chancery. *Sarsfield v. Van Vaughner*, 444

2. The act of 1862, repealing the section of the revised statutes which required the court of chancery to dismiss every suit involving less than \$100, did not revive any former rule; because the code had previously repealed that section of the revised statutes, and abolished every other rule limiting the jurisdiction of the supreme court. cb

3. Yet when the amount in controversy is less than \$100, this may affect the question of costs. cb

See ACTION, 9.
INFANTS.

JURY.

See NEW TRIAL.

L

LANDLORD AND TENANT.

1. After an agreement by a landlord to repair is broken, it becomes a chose in action in the tenant's favor, upon which he can maintain an action against the landlord. *Merrick v. Bashford*, 191

2. If a grantee in fee of the landlord refuses to recognize any liability to repair, and the tenant, with notice of such refusal, attorns to him and pays him rent, the grantee is not liable on the landlord's contract to repair, if such contract was broken, and the landlord's liability for the breach was complete, before the grantee had acquired any legal estate in the premises. cb

3. If, after a purchaser from the landlord has repudiated the landlord's covenant to repair, and refused to perform it, the tenant, avowing his intention to hold the lessor upon his covenant, continues in possession of the premises, attorning to the purchaser, by the payment of rent,

without objection, as it becomes due, this will be held to be evidence, *prima facie*, at least, of a waiver by the tenant of any claim upon the purchaser, on the landlord's covenant to repair cb

LEASE.

See TAXES AND ASSESSMENTS, 4.

LEX LOCI CONTRACTUS.

1. Contracts are to be construed and adjudged by the laws of the place where they are made, except when they are to be performed in another state or country. In such cases their validity is to be decided by the laws of the place of performance. *Balme v. Wombough*, 352

2. Yet cases involving the rate of interest, where it is stipulated in the contract at the place where the loan is made, in conformity with the law of that place, at a higher rate than is permitted by the law of the place of payment, are not within the exception, but the specified rate of interest at the place of contracting will be allowed. cb

3. Promissory notes, made and dated in Minnesota, for money there loaned and advanced, payable at a bank in the state of New York, with interest at 26½ per cent per annum, and secured by mortgage on land in Minnesota will not be declared void, by the courts of this state, or be directed to be surrendered and canceled. cb

M

MARRIAGE PROMISE.

1. In an action by a female to recover damages for a breach of a contract to marry, the judge allowed the plaintiff, after she had testified, without objection, to the defendant's promise that she should not be any the worse for him, nor come to any disgrace by him, and if she did he would marry her, to testify that she was pregnant by the defendant, at the time he abandoned her. *Held*

that the evidence was properly received. *Hotchkiss v. Hodge*, 117

2. A wrong done to the female, such as sexual intercourse with her, by her alleged suitor, will not make a promise to marry, founded thereon or arising therefrom, invalid or inoperative. Such a promise is not liable to the objection that it encourages immorality. *ib*
3. It is too late, after the frequent adjudications in our own state and elsewhere, to consider the question whether long bestowed and particular attentions, having apparently an honorable object, furnish sufficient evidence from which the jury may imply a promise of marriage. *ib*
4. It is not indispensable that a promise to marry should be *express*. It may be *implied* from circumstances; and it may rest partly on both; that is, on express words, and on conduct and acts reasonably leading to the same conclusion. *ib*
5. In action by a female, for a breach of promise of marriage, evidence to show that the plaintiff drank to excess, and sometimes to intoxication, without specifying under what circumstances the alleged excesses took place, or that her general reputation, even as to sobriety, is bad, is inadmissible in mitigation of damages. *Button v. McCauley*, 418

MERGER.

See MORTGAGE, 3.

MONTAUK LANDS.

See STATUTES.

MORTGAGE.

1. When a mortgage or judgment has been once paid, and the lien discharged, the parties cannot restore the lien, to the prejudice of third persons who are then incumbrancers. *Angel v. Boner*, 425
2. If the mortgagor can become the absolute owner, in his own right, of the bond and mortgage, the debt will be extinguished and the lien of the mortgage discharged by an unconditional assignment of the mortgage to him; and it is not in the power of the assignor and assignee, by any arrangement they may make, to restore the lien of the mortgage, so that it shall have priority over a junior mortgage. *ib*
3. W. borrowed money of G. and gave his bond and mortgage to secure the payment of the amount. G. demanding his money, W. procured L. to indorse his note and to raise the money for him, on being secured by the bond and mortgage, which were assigned by G. to L. for that purpose. At the maturity of the note W. applied to B. for the money, upon the security of the same bond and mortgage; informing him there were two other mortgages upon the same premises, one of which was prior and the other subsequent to the one in question. B. agreed to furnish the money, upon the terms proposed. W. then applied to L. to have the mortgage assigned to him (W.) to be by him assigned to B.; and L. accordingly assigned the same to W. to enable him to get the money, by assigning the same to B. W. thereupon assigned the mortgage to B. and obtained the money thereon, with which he paid the note indorsed by L. *Held* that under the circumstances, W. never owned the bond and mortgage, even for an instant, nor did he pay the debt secured thereby. That it was not a case of payment and satisfaction; nor a case for the application of the doctrine of *merger*. *ib*
4. *Held, also*, that W. was merely an assignee in trust; the trust being specified by the parties, though not expressed in the written assignment, viz: that W. should raise money upon the bond and mortgage and therewith pay the note indorsed by L. And that equity would have enforced a performance of the trust. *ib*
5. *Held, further*, that by such assignment of the mortgage to W., the mortgagor, for the purpose above mentioned, the lien and priority thereof was not lost, or postponed to that of a junior mortgage. *ib*

See GUARANTY.

MUNICIPAL CORPORATIONS.

1. Municipal corporations are not liable in damages for any injury or inconvenience to the owners of property upon the streets of the village or city, resulting from the improvement of the streets, such as grading, paving, laying curb and gutter stones, sidewalks; &c., by authority of law, when there is no negligence or unskillfulness in conducting the work of improvement. *Kavanagh v. City of Brooklyn*, 282
2. Incidental damages to the owners of property, resulting from the establishing or altering of the grade of a street are not to be provided for, or paid, in any form, but are regarded and treated as *damnum absque injuria*. *ib*
3. The fundamental principle that prevails in all the statutes authorizing or providing for the grading, paving and improving of streets, is that the property thought to be benefited must pay all that is to be paid, and not the municipal treasury. *ib*
4. The rule of the common law is equally adverse to the claim of an individual property owner to be compensated for losses not resulting from misconduct or unskillful management, but arising necessarily from the making of the improvement. *ib*
5. The ordinance of a city corporation, directing the construction of a public improvement, within the general scope of its powers, is a judicial act; but the prosecution of the work is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner. *ib*

N

NEGLIGENCE.

See ANIMALS.

RAIL ROAD COMPANIES.

NEW TRIAL.

What irregularities in the conduct of a jury will not be sufficient

grounds for a new trial. *Hager v. Hager*, 92

NEW YORK (CITY OF.)

1. The act of the legislature of March, 1820, authorizing the corporation of New York to extend the battery into the river not exceeding 600 feet, vested in the corporation the title to the soil under the water so to be filled in, but limited the use of the land so to be made out of the water, to be for a public walk, and for erecting buildings and works of defense thereon, but without any power to the corporation to dispose of the same for any other use or purpose whatever, and without any power of selling it, or any part thereof. *Held* that this restriction, in the act, prevented the corporation from selling or otherwise disposing of any part of the land so to be acquired, for any private purpose whatever. *The People v. Vanderbilt*, 282
2. *Held, also*, that any grant or other conveyance of the land, for any private purpose, would be void; and that any attempt to use the land for purposes forbidden by the grant, would justify the people of the state in applying to a court of equity to prevent such a breach of the condition in the grant, independent of the act of 1867, establishing an exterior line and prohibiting the extension of any piers beyond that line. *ib*
3. *Held, further*, that the passage of the act of 1867 did not deprive the grantors of that right; notwithstanding that act provides a method by which, after a pier or other obstruction to the navigation has been erected, it may be removed. *ib*
4. The existence of the power to compel the removal of an obstruction, after it has been created, does not prevent an application to the court to prohibit the erection of such obstruction. *ib*
5. If there is no legal authority for the erection of a pier, in a navigable river, such pier will be a nuisance *per se*; and no evidence is admissi-

ble to show that though illegal, it will do no harm. 23

6. The question whether the title to the streets was in the corporation of the city of New York, and whether the corporation could object, on constitutional grounds, to the laying down of a rail road track in the streets, by the grantees under the act of April 17, 1860, without compensation therefor being made to the corporation as owners of the fee, having necessarily been before the court in *The People et al. v. Kerr et al.*, (87 Barb. 357,) and the court there deciding that the legislature was clothed with the power of granting to the defendants the right to put down and operate a rail road in the streets of the city without paying any compensation for such new use of the soil of the streets, either to the corporation, or to the owners of lots fronting on the streets, the court will not entertain a similar action, brought by the corporation of the city, to restrain the laying down and operation of a rail road by the grantees, under said act, until the parties have invoked the judgment of the court of appeals upon the questions involved. *Mayor &c. of New York v. Kerr*, 369

See TAXES AND ASSESSMENTS.

NOTICE.

See FORECLOSURE SUIT.
VENDOR AND PURCHASER, 1.

NUISANCE.

See NEW YORK (CITY OF,) 5.

O

OFFICE.

A general non-performance of the duties of an office is a refusal to serve. A refusal to serve may be as clearly and strongly inferred from the acts of an incumbent as from a direct assertion that he will not discharge the duties of the office. *Colton v. Beardley*, 29

See COMMON SCHOOLS, 1 to 6.

OPINIONS OF WITNESSES.

Although courts have received evidence of the price paid for the identical property or article in suit, as some evidence of its value, yet when a large number of articles are sold in the aggregate for a given sum, the opinion of witnesses as to the value of a part of the articles, will not be received for the purpose of ascertaining the value of the other part, in an action for the conversion of the latter. *Wells v. Kelsey*, 242

See AGREEMENT, 3.

P

PARTIES.

1. A hostile interest which will prevent the joining of parties as plaintiffs, within the meaning of the cases, occurs when the plaintiff makes a claim which is antagonistic to the claim of another. *Brooks v. Peck*, 519
2. It cannot occur when the legal rights of the parties are the same, and the only question is as to the expediency of having those rights enforced at a particular time; unless as to some of the parties, it is expedient that the rights should be enforced at one period, while as to others it is expedient that they should be enforced at another period. 23

See ACTION.
CORPORATION, 10.

PARTNERSHIP.

1. Although a partner cannot, ordinarily, through a sale of his interest in the partnership, introduce the purchaser into the firm as a copartner, without the consent of the other members, yet there is no law which prohibits a partner from selling out his interest in the partnership. *Merrick v. Brainard*, 574
2. Where, by the partnership agreement, it is provided that the interests of the partners shall be transferable, and may be transferred at the will of each partner, and that the purchaser shall be clothed with all the

rights of his vendor, a transfer of the interest of a partner will work no dissolution, and the purchaser becomes to all intents and purposes a partner; and, as between the partner selling or assigning his interest and his copartners, the former will cease to be a partner, or to be liable as such. *ib*

8. Where a complaint averred an assignment by an insolvent partnership firm to the plaintiff, in trust for the benefit of creditors, and the defendants on the trial admitted the execution of the assignment as averred in the complaint; *Held* that the defendants were precluded from afterwards raising the objection that the assignment was not executed by all the partners. *Colewell v. Lawrence*, 648

4. *Held, also*, that the objection was one which should have been made on the trial, because the want of signature of one of the partners might have been remedied by proof of his assent to the signature of the firm. *ib*

5. Where one copartner makes a sale or disposition of the partnership property, in his own name, and without disclosing the name of his copartner or copartners having an interest therein, and at the same time makes a warranty of the soundness thereof, also in his own name, an action may be maintained against him for a breach of the contract of warranty, without joining his copartner, in the action. *Cookingham v. Lasher*, 656

6. A partner having made a contract in his own name, and not in the name of himself and his copartner, cannot be allowed to turn the other party to the contract over to a litigation with a stranger, simply because the latter has an interest in the property sold. *ib*

PATENT.

See ACTION, 9.

PIER.

See NEW YORK (CITY OF), 5.

PLEADING.

See ANSWER.
COMPLAINT.

POSSESSION.

See TRESPASS.
VENDOR AND PURCHASER, 10.

POWER OF ATTORNEY.

See CORPORATION, 20 to 30.

PRACTICE.

1. When a case comes before the court upon *exceptions* ordered to be heard in the first instance at the general term, no question of *fact* can be discussed; nor the point that the decision of the jury is against the weight of evidence. *Hotchkiss v. Dodge*, 117
2. A defendant requested the court to charge in a particular manner. This was refused, on the ground that the previous charge covered the whole ground occupied by the evidence. To this refusal the party excepted, but without excepting or objecting to the remark of the judge that the matter had been already charged upon, and without asking that the question of fact whether such charge had been made covering the whole case embraced by the evidence, should be submitted to the jury. *Held* that the proper exception not having been taken, the defendant was remediless. *ib*
3. Where the decision made at the circuit is correct, but the judgment is erroneously entered, the remedy of the party is not by appeal from the judgment, but by motion at a special term, to correct the error. *Campbell v. Adams*, 182
4. In order to make an exception on account of the rejection of evidence available, the party should make his offer in such plain terms as to leave no room for doubt as to what is intended. If the offer is open to two constructions, he cannot in a court of review, insist upon that construction which is more favorable

to himself, unless it appears that it was so understood by the court which rejected the evidence. *But-ton v. McCauley*, 418

5. It is well settled that an exception to the refusal of the court to dismiss the complaint cannot be sustained on account of the deficiency of any proof that might have been supplied upon the trial, had the attention of the court and of the opposite party been called thereto. *Shotwell v. Malt*, 445

PREMIUM NOTES.

See INSURANCE (FIRE.)
INSURANCE COMPANIES.

PRINCIPAL AND AGENT.

1. Where an agent is prosecuted, and a judgment obtained against him, for an act done in obedience to instructions from his principal, such act being done in good faith, and under the belief that the instructions were reasonable, and the act lawful, he is entitled to reimbursement from his principal, for all the damages he has sustained. *Hove v. The Buffalo, New York and Erie Rail Road Company*, 124
2. And it is immaterial whether the act for which the recovery was had against the agent was in fact lawful or unlawful; the instructions being, on either hypothesis, the proximate cause of the action and recovery. *ib*
3. The settlement of the judgment by the agent, after he has been charged in execution, by giving his note for the amount, is a good payment of the judgment. *ib*
4. If the agent is charged in execution upon the judgment recovered against him, this is the highest satisfaction known to the law, and is equivalent to an actual payment by him, in money, of the judgment, for the purpose of charging his principal with the liability for full reimbursement. *ib*

PRIVILEGED COMMUNICATIONS.

1. A conversation between a person who has been tried upon an indict-

ment and acquitted, and one who was his counsel on the trial, had after the relation of counsel and client has ceased, no further proceedings being contemplated, upon a subject unconnected with that to which the employment of the witness as counsel related, is not a privileged communication. *Fishell v. Winans*, 228

2. Where professional communications are made by two or more clients jointly, to their mutual legal adviser, the seal of confidence can only be removed by *all* of them. The consent of even a majority is not sufficient; and one or more of them cannot require a disclosure of the communication, as evidence against the others, without their consent. *Whiting v. Barney*, 398

8. In a litigation subsequently arising between the parties, out of the very matter respecting which they took advice, one of them cannot, as against the other, and without his consent, call upon the attorney to disclose the communication made to him in professional confidence, by *both*, jointly. *Johnson. P. J. dissented.* *ib*

4. Nor will the fact that one of the parties, who has since died, might, were he living, be called upon to prove the facts which were stated by him to the attorney, entitle the other party to the testimony of the attorney. *ib*

5. Communications made by a lender to his attorney, respecting a loan, after the making thereof, when no one else was present, and which were drawn out in consequence of the confidential relation existing between the lender and the attorney, are also privileged. *ib*

PROMISSORY NOTES.

In an action by indorsees, against the first indorser of a promissory note, who indorsed the same as "assignee," it being proved that the defendant was assignee of an insolvent estate; that the note was received in compromise of a note belonging to that estate; that it appeared on the note that it was

payable to the defendant as assignee, and was indorsed by him in that capacity; *Held* that the indorsement operated to transfer the title to the note, without making the indorser personally liable. *Bowne v. Douglass*, 812

See INSURANCE COMPANIES.

PUBLIC OFFICERS.

See EVIDENCE, 1, 2, 3, 4.

R

RAIL ROADS.

See NEW YORK (CITY OF,) 6.

RAIL ROAD COMPANIES.

D. & M. had an absolute contract with a rail road company to draw its cars, over a certain portion of the road, to furnish the horses and drivers for that purpose, and to assume the entire control of the work. *Held* that while D. & M. were in the performance of this contract, the rail road company could not be made liable for the negligent acts of D. & M.'s employees. *Schular v. The Hudson River Rail Road Company*, 658

80

RECEIPT.

See AGREEMENT, 8, 9.

RELIEF.

See COMPLAINT.

REPUTATION.

See EVIDENCE, 1, 2, 4.

S

SHERIFF.

In an action on the case, against a sheriff, for neglecting to take the body of a defendant in execution,

the sheriff should be allowed, by way of mitigating damages, to prove the pecuniary circumstances and condition of the defendant in the execution. *Dunaway v. Fay*, 18

See ACTION, 15.

CHattel MORTGAGE, 4.

STATUTES.

1. The act of the legislature of April 2, 1862, to incorporate the proprietors of Montauk lands, in the town of East Hampton, in Suffolk county, does not vest the trustees with the title, or give them the possession, of the lands. Nor does it empower the trustees to sell the grass or herbage growing thereon, or to enter into contracts of agistment, which shall bind the corporation. *Appley v. Trustees of Montauk*, 276

2. And where, in an action against the trustees, as bailees or agisters, to recover the value of a horse which had been pastured on the common lands, and was alleged to have been mired and killed in consequence of the carelessness and negligence of the defendants, it appeared that the trustees had no rights of pasturage to sell or dispose of, and no right to enter into any contract in regard thereto; and that the contract for the pasturage was made not with them, but with the owners of the pasture rights in the land; it was *held* the action would not lie against the trustees. 29

STOCK.

See CORPORATION, 7 to 30.

STOPPAGE IN TRANSITU.

See VENDOR AND PURCHASER, 12.

STREETS.

See EJECTMENT.

NEW YORK (CITY OF,) 6.

SUBSCRIPTION PAPER.

See ACTION, 10.

SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF LANDS.

1. A pier erected in a navigable river, is within the meaning of the statute concerning summary proceedings to recover the possession of lands, which relates to the tenants of any houses, lands or tenements. *People ex rel. Wood v. Kelsey*, 269
2. The word "tenement" signifies every thing which may be holden, if it be of a permanent nature; and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself. *ib*
3. What amounts to a lease, which will create the relation of landlord and tenant, between the parties. *ib*
4. Whenever the relation of landlord and tenant is made out, in summary proceedings to recover the possession of the demised premises, the tenant is estopped from disputing the title of his landlord. *ib*
5. The failure of the lessor to construct a pier in conformity with the stipulations of the agreement, though it may constitute a good defense to an action upon the lease, to recover the rent, is no defense or answer to the claim of the landlord to have the possession restored to him. *ib*
6. Where tenants have taken possession of the demised premises, under the lease, and have thus become vested with the term, they cannot refuse to pay the rent, and at the same time retain the possession and enjoyment of the premises, against the claim of the landlord. *ib*
7. They have their election to pay the rent, or restore the possession when demanded. They cannot withhold both the rent and the possession. *ib*
8. In summary proceedings to recover the possession of lands, it is right and proper for the judge to charge the jury, upon the law of the case. *ib*

SUPREME COURT.

Decisions made at a general term of the court in any district, if expressly

in point, should be followed in other districts; unless evidently made through some mistake, or they are so clearly erroneous that there can be no hesitation as to the error. *Bentley v. Goodwin*, 633

T

TAXES AND ASSESSMENTS.

1. The 84th section of the act of March 30, 1850, in relation to the assessment and collection of taxes in the city of New York, &c. (*Laws of 1850, p. 188*), authorizing a levy, for a tax, upon the goods and chattels of the person against whom a warrant is issued, or upon goods and chattels in his possession, &c. was not intended to cover a mere constructive possession, where there is not a sole and actual possession. *Stockwell v. Veitch*, 650
2. The act is to be construed strictly, and no property which is not actually in possession of the party who is taxed should be held liable to seizure. *ib*
3. If the property does not belong to the person assessed, it must be solely in his possession. *ib*
4. A lease, given by the corporation of New York, furnishes no evidence of the existence of the facts necessary to warrant proceedings to effect a sale of land for taxes or assessments; but after those facts have been established, and the proceedings for a sale of the premises have been ordered and commenced by advertisement, any irregularity which may occur in the proceedings will be cured by the lease. *Sanders v. Leavy*, 70
5. The omission to specify, in a notice of sale, the person to whom the payment of the tax is to be made, will not affect the regularity of the sale. All that is necessary, under sections 9 and 10 of the act of 1840, is a mere notice of the sale, embracing the time and place. *ib*
6. The certificate of the street commissioner that an affidavit of the service of the redemption notice re-

quired by the statute to be served upon the occupant or person last assessed as owner, has been filed with him, and that he is satisfied such notice has been served, though it may be sufficient to afford prima facie evidence that such affidavit was filed with him, and that the money remained unpaid, furnishes no evidence that the act has been performed which was necessary to give effect and vitality to the lease. wb

7. Notice to the occupant, &c. default in payment, and the certificate of the street commissioner that the payment required has not been made, are all necessary to be shown, by the purchaser at an assessment sale, as a condition precedent to the validity of the lease. wb

See COMMON SCHOOLS, 11, 12.

TAX WARRANT.

See COMMON SCHOOLS, 13, 14.

TRESPASS.

1. To constitute a cause of action for trespass upon land, it must appear that the plaintiff, at the time of the alleged trespass, had the actual possession of the land, or that, being then dispossessed, he has since regained the possession by entry, or has obtained a judgment awarding it to him. *Cowenhoven v. The City of Brooklyn*, 9
2. A plaintiff cannot recover damages for injuries to his possession, when the allegations contained in his complaint negative the existence of such possession in him. wb

TRUSTS AND TRUSTEES.

1. A trust to pay the rents and profits to J. during her life, and after her death to convey to such of her children as should survive her, contained in a deed of bargain and sale made previous to the revised statutes, was not executed as a legal estate in the *cestui que trust* by the law of uses then in force. *Wood v. Mather*, 478
2. By such a trust the children of J. during her life took vested equitable

estates in remainder subject to be defeated, wholly, by their dying before her; or, in part, by the coming in *in esse* of after-born children of J. wb

3. The revised statutes, subsequently enacted, did not turn these equitable estates into legal ones during the life of J. wb
4. In trusts of real estate, created before the revised statutes, the legal title of the trustee, on his death happening after the revised statutes, descends to his heirs. The revised statutes cutting off descent, in case of trustees, are to be construed prospectively. wb
5. Proceedings for transferring the title of infant *trustees* under the revised statutes (article concerning the sale of infants' estates) are not affected by the 176th section of the article. That section applies only to the sale of infants' estates *held in their own right*. wb
6. Section 66, 1 R. S. 780, making void any sale or act by a trustee in contravention of the trust expressed in the trust deed, applies only to the acts of *trustees*, and does not divest courts of equity of their power over the legal title when vested in infant trustees. wb

V

VARIANCE.

See COMPLAINT.

VENDOR AND PURCHASER.

1. Of land.

1. Although a grantee of land be not shown to have had express notice of a restriction in respect to the use of the property, contained in previous deeds, yet if the conveyances under which he holds refer to the deeds in which the restriction is contained, and those deeds are recorded, he will be deemed to have had notice of the existence of such restriction in the original deeds, and of its consequences. *Gibert v. Peteler*, 488

2. Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands, without repaying those expenditures, to the vendees. *ib*
3. If a vendor is unable to make a good title to a portion of the premises, the vendees are entitled to elect whether they will rescind the contract *in toto* and receive back their expenditures under it, or will receive such a conveyance of the whole property as the vendor can give, paying him the price stipulated, less such deduction as may be just, for the defect. *ib*
4. If, in such a case, the vendees elect to rescind the agreement, *in toto*, they are entitled to be repaid the amount which they have expended in compliance with its terms, in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession, or the recovery thereof by the legal owners. *ib*
5. But if the vendees elect to receive such a title as the vendor can give, with compensation for the defect, they have the right to ask for a judgment to that effect. *ib*
6. The vendor cannot recover the possession of the premises, until the vendees have had an opportunity to make their election, and have it complied with, either by the repayment to them of their expenditures, or by the payment of the sum which shall be fixed as the proper purchase money, upon a tender of a conveyance of the vendor's title. *ib*
7. Purchasers will not be compelled to take a part only of what they agreed to buy as an entirety. *ib*
8. The compensation for the deficiency, in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value of the whole property in consequence of defects or incumbrances, and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all, with a conveyance of the residue only. *ib*
2. Of chattels.
9. Upon a sale of molasses, made at Havana, by P. to U. P. & Co. the purchasers agreed to pay the price, on delivery. Subsequently, after U. P. & Co. had become embarrassed, and at a time when their bankruptcy was imminent, they obtained the delivery of the molasses on board their vessel, and procured a bill of lading thereof. Having failed, without the knowledge of P., they caused the vessel so laden with the property, to depart for New York, consigned to M. T. & Co., without paying for the molasses, and upon payment being demanded, they refused it, for want of ability. *Held* that there was sufficient evidence of the fraudulent intention of U. P. & Co. to obtain the delivery of the property without payment of the price, to require that question to be submitted to the jury, in an action by P. against a subsequent purchaser, to recover the value of the goods. *Pequeno v. Taylor*, 875
10. *Held, also*, that if the intent of the purchasers was fraudulent (which it was for the jury to determine) then the production at the trial of a note given by them at the time of the sale, for a part of the price, and an offer to surrender it, was in season; even if it should be found that the sale was partly upon credit. And this, although the note might have been, at some period, out of the hands of the plaintiff; provided the possession and exclusive interest was in him at the time of the trial. *ib*
11. This is the rule where the note is that of the fraudulent vendee, and not the note of a third party. *ib*
12. *Held, further*, that the right of stoppage *in transitu* was not in the case; the delivery of the property by the vendor on board the vessel of the purchasers having placed the same entirely in their dominion, and the property having reached its destination, as between the vendor and

vendees. And the molasses was not *in transitu*, as between them, on its passage from Cuba to New York. *ib*

13. *Also held*, that if the note given by the purchasers was purely an accommodation note, and not an advance upon the security of the molasses when delivered; or if the purchasers, at the time the vendor made his demand for payment, waived a return of the note; the jury would have been justified in finding for the plaintiff as upon a conditional sale. But if the note was an advance upon such terms as to entitle the purchasers to claim the right to appropriate so much of the price of the molasses as would be sufficient to meet the note, and there was no subsequent waiver of that right, then the sale was not conditional. That the delivery must be considered conditional as to the whole of the property, or as to none. *ib*

See AGREEMENT, 1, 2, 3, 6, 7, 8.
JUDGMENT, 8.

W

WARRANT.

See COMMON SCHOOLS, 12, 13, 14.

WEARING APPAREL.

See EXECUTION

WILD BEASTS.

See ANIMALS.

WILL.

1. Execution.

1. One of the subscribing witnesses to a will testified that she saw the testator sign his name, at the end of the paper; that he then said "we want you to sign this;" that she did sign her name to a paper, in his presence; but did not hear him say that it was his last will and testament; that she heard the other subscribing witness say, in the testator's

presence, at the time the latter signed the instrument, that it was the testator's last will and testament; but that there was no word or sign of assent by the testator; and that he was deaf, and in her opinion did not hear all that was said. *Held* that this was not sufficient evidence of a due publication, to authorize the surrogate to admit the will to probate. BACON, J. dissented. *Trustees of Theological Seminary of Auburn v. Calhoun*, 148

2. Notwithstanding the failure of one witness to remember that all the statute formalities were complied with, if they are proved by the other to have been observed, the will will be admitted to probate. *ib*

3. But before this principle can apply, the surrogate must be satisfied that the witness testifying to a compliance with the requisite forms is truthful—that he is telling the transaction precisely as it occurred. If one witness undertakes to swear to matters which the other swears never occurred, it is for the surrogate to say which he will believe. *ib*

4. A testator, and three other persons, M., H. and C., being together in the same room, the testator asked M. if he would witness his will, and if H. and C. would do so, also. M. answering that H. and C. had said they would, the testator produced and signed a paper, and declared it to be his will. M. then signed the attestation clause; after which, at the request of the testator, and in his hearing, he asked H. and C. to witness the will, in these words: "Mr. G. [the testator] requests you to witness his will;" the testator making no objection. The will was then signed by H. and C. as witnesses. *Held* that the will was well executed. *Matter of proving the will of Gilman*, 364

5. An instrument is signed at the end thereof when nothing intervenes between the instrument and the subscription. Accordingly *held* that a codicil was signed by the subscribing witnesses at the end thereof, although there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause. *ib*

6. When the person who drew a will called the subscribing witnesses from an adjoining room, in the presence and hearing of the testator, who had already affixed his signature, and requested them to witness the will; the testator seeing the witnesses come into the room and there sign the instrument, as witnesses of its execution, he making no sign of dissent; *Held* that what was said by the scrivener must be considered as adopted by the testator as his own act and language; and that there was a sufficient acknowledgment and publication of the will, and request to the witnesses. *Peck v. Cary*, 77

2. *Construction of, in particular cases.*

See *Floyd v. Fitcher*, 409.
Shulters v. Johnson, 80.
Turner v. Tooley, 596.

3. *Probate.*

7. The decree of a surrogate, admitting a will to probate, determines only the sufficiency of its execution. In respect to that question, the *domicil* of the testator is unimportant. *Matter of proving the will of Gilman*, 364

WITNESS.

1. On the settlement of the accounts of an administrator, before the sur-

rogate, in 1861, the administrator offered himself as a witness to show what took place between himself and his intestate in reference to the making of a note, and to show that he signed the note at the request and for the benefit of the intestate, as his surety. *Held* that under the law as it then existed, previous to the amendment of section 899 of the code, in 1862, he was a competent witness. *Bolton v. Smead*, 141

2. On a trial occurring in January, 1860, a defendant was not authorized to give evidence as a witness in his own behalf, in a suit brought by an executor of a deceased person, notwithstanding a co-defendant, united with him in interest, had been previously examined as a witness for the plaintiff. *Wood v. Hunt*, 302

3. Plaintiffs cannot be permitted to depart from the case made by their own complaint, in respect to the unity of interest of the defendants, and adopt, for the purpose of defeating the application of a defendant to be examined as a witness in his own behalf, the case made by the answer of such defendant. 36

4. The code has not so changed the law as to allow a husband to examine his wife as a witness, in a case in which she is not a party. *White v. Stafford*, 419

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